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IN THE

Supreme Court of the United States

PROMEDICA HEALTH SYSTEMS, INC., THE TOLEDO HOSPITAL, AND TOLEDO CHILDREN'S HOSPITAL,

Petitioners,

v.

NATIONAL LABOR RELATION BOARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a hospital employer, who maintains a lawful policy against solicitation and distribution of literature by employees in patient care areas, but who has permitted or overlooked some instances of charitable or personal solicitation, violates the National Labor Relations Act if it enforces the policy in a situation involving union-related solicitation or distribution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties in the Sixth Circuit Court of Appeals were the National Labor Relations Board, ProMedica Health Systems, Inc., the Toledo Hospital, and Toledo Children's Hospital. ProMedica Health Systems, Inc. has no parent corporation, and there is no corporation that owns ten percent or more of its stock. The Toledo Hospital and Toledo Children's Hospital are wholly owned subsidiaries of ProMedica Health Systems, Inc.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The judgment of the court of appeals below is unreported. (Pet. App. 3a.) The order of the National Labor Relations Board and the recommendation of the administrative law judge are reported as *ProMedica Health Sys., Inc.*, 343 NLRB No. 131. (Pet. App. 21a.)

JURISDICTION

The court of appeals entered its judgment in this matter on October 5, 2006. Jurisdiction exists in this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

In its pertinent part, the National Labor Relations Act ("NLRA" or "Act") provides that:

> It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. § 158(a)(1) & (a)(3).

STATEMENT

At issue in this case is whether, under the NLRA, a hospital employer who has previously permitted or overlooked isolated instances in which employees sold Girl Scout cookies, church raffle tickets, or the like is thereafter barred from undertaking any efforts to control union-related

solicitation and distribution in these same areas. The National Labor Relations Board ("Board") and the United States Court of Appeals for the Sixth Circuit answered this question in the affirmative. This holding, however, conflicts with decisional authority from at least two federal circuits; is inconsistent with the will of Congress as expressed in the Act; and stands as an impediment to health care institutions' ability to provide patients with the peaceful atmosphere and tranquil environment necessary for the effective delivery of patient care.

By way of background, it is well-settled that the Act *permits* hospitals to prohibit solicitation and the distribution of literature – even if union-related – in the areas that it delivers patient care. *See NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 790 (1979) (holding that the employer lawfully prohibited "solicitation in the corridors and sitting rooms on floors of the Hospital housing either patients' rooms or operating and therapy rooms"). This rule is grounded directly in patient care concerns. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978). ("[I]n the context of health-care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid.").

Indeed, when Congress first extended coverage of the NLRA to health care institutions in 1974, there "was a recognized concern for the need to avoid disruption of patient care whenever possible." *Id.* at 498 (quoting S.Rep. No. 93-766, p. 6 (1974)). This concern is well-placed:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family – irrespective of

> whether that patient and that family are labor or management oriented – need a restful, uncluttered, relaxing and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.

Baptist Hosp., 442 U.S. at 783 n.12 (internal citations and quotations omitted).

These principles and concerns notwithstanding, the Board and lower courts have held that a hospital employer violates the NLRA if, in enforcing a lawful solicitation/distribution policy, it "discriminat[es] against union solicitation." *NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 495, 961 (6th Cir. 2000). Thus, for example, a hospital commits an unfair labor practice under the NLRA if it simultaneously permits employees to distribute anti-Union literature in patient care areas while forbidding them to distribute pro-union literature. *Id.*

Here, however, the Sixth Circuit enforced a Board order that extends the concept of "discrimination" so as to swallow the general rule permitting hospitals to shield patients from "the tensions of the marketplace." *Baptist Hosp.*, 442 U.S. at 783 n.12 (internal citations and quotation omitted). Specifically, the Sixth Circuit held that an employer who has "knowingly permitted" employee solicitations and distributions wholly *unrelated* to union issues violates the Act if it thereafter enforces its solicitation and distribution policy as to union matters. (Pet. App. 11a.) Under the law of this case, then, an employer who has failed to prevent non-controversial activities such as the sale of Girl Scout cookies or church raffle tickets in patient care areas is thereafter precluded from banning union-related solicitations, or the distribution of union-related material, in any location, including patient care areas.

The Sixth Circuit's opinion is, in equal parts, disturbing and groundbreaking. At least two other courts of appeals

have addressed this question. Giving due deference to patient care interests, both have expressly rejected the standard adopted by the Sixth Circuit and the Board in this matter. *See Manchester Health Ctr., Inc. v. NLRB*, 861 F.2d 50, 54 (2d Cir. 1988); *S. Md. Hosp. Ctr. v. NLRB*, 801 F.2d 666, 674 (4th Cir. 1986). In short, this matter presents an important and recurring question that warrants this Court's review.

I. FACTS

ProMedica operates several hospitals and related facilities throughout Northwest Ohio and Southeast Michigan. Its Central Region encompasses several facilities including The Toledo Hospital, Toledo Children's Hospital, and Flower Hospital. Approximately 7,300 employees work in ProMedica's Central Region facilities.

Within the Central Region, ProMedica applies its Policy #606, which prohibits solicitation and the distribution of literature "in immediate patient care areas." On numerous occasions in prior years, ProMedica managers and supervisors enforced Policy #606 against non-union-related solicitations and distributions. For instance, managers and supervisors have regularly instructed employees that any sales, fundraising activities, and charitable solicitations must be conducted outside of work times and outside of patient care areas. Various ProMedica managers and supervisors have coached and/or disciplined employees for violating the policy by selling theater tickets, wrapping paper, wood work, Girl Scout cookies, car detailing services, wooden shoes, magnets, potholders, name tags, and Avon products in patient care areas and/or on work time. And on a number of occasions, managers have removed from nurses' stations catalogues for products such as Avon cosmetics, Longaberger baskets, and Tupperware containers.

In May and June 2000, ProMedica coached three employees – Dee Lynn Keckler, Cynthia Miller, and Robert

Hazenfratz – for violating Policy #606 by engaging in union-related solicitation or distribution activities in patient care areas.

II. PROCEEDINGS BELOW

On August 10, 2000, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW ("UAW") filed unfair labor practice charges alleging, among other things, that ProMedica's coachings of Keckler, Miller and Hazenfratz violated Sections 8(a)(1) and (a)(3) of the Act. Beginning on October 16, 2001, an administrative law judge ("ALJ") conducted a hearing on the UAW's allegations.

On May 6, 2003, the ALJ issued an opinion, concluding that ProMedica had enforced Policy #606 in a discriminatory fashion. Notwithstanding ProMedica's efforts to enforce the policy as to non-union-related matters, the ALJ determined that ProMedica had not successfully halted all such activities. The ALJ relied upon generalized testimony "that nonunion solicitations generally occurred in the hospital and in the nurses' station; that items such as candy bars were sold; and various catalogs for Tupperware, Mary Kay, and Avon cosmetics, and party books are available in the nurses' station." (Pet. App. 69a.) The ALJ cited no evidence that ProMedica had ever permitted anti-union solicitations or distributions in patient care areas, or that it had ever permitted employees supporting unions other than the UAW to engage in solicitation or distribution activities in such areas.

ProMedica filed timely objections to the ALJ's opinion. On December 16, 2004, and without specifically addressing the appropriate standards for determining whether an employer's enforcement of its solicitation and distribution policy was discriminatory, the Board issued an Order that adopted the ALJ's rulings, findings, conclusions in all respects relevant to this petition. (Pet. App. 21a-22a.)

On May 24, 2005, the Board filed a petition in the Sixth Circuit to enforce its Order. On June 13, 2005, ProMedica filed a cross-petition for review. On October 5, 2006, the Sixth Circuit issued an opinion enforcing the Board's Order with regard to the Hazenfratz, Keckler, and Miller allegations. In this respect, the Sixth Circuit rejected ProMedica's argument that "even if it knowingly permitted 'isolated' non-union related solicitations and distributions, it did not violate the Act by enforcing [Policy #606] against [Hazenfratz, Keckler, and Miller] because they solicited for the Union in patient care areas." (Pet. App. 11a.) The Sixth Circuit acknowledged, however, that its standard for what constituted discriminatory enforcement of an otherwise valid solicitation and distribution policy "conflicts with the Fourth Circuit's rule" in this regard. (*Id.*)

REASONS FOR GRANTING THE WRIT

Under the concept of "discrimination" applied in this matter, a hospital may not undertake efforts to control union-related solicitation or distributions in patient care areas if it has ever condoned or overlooked an employee's sale of Girl Scout cookies or charity raffle tickets at a nurses' station. This is not the law of the Fourth Circuit, and it is not the law of the Second Circuit. This important matter – integral to the right of this nation's health care institutions to control the environment in which patient care is delivered – deserves this Court's time and attention.

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT AMONG THE CIRCUITS.

As previously noted, an employer violates Sections 8(a)(1) and (a)(3) of the Act if it discriminatorily enforces a lawful policy prohibiting solicitation and distribution activity in patient care areas. Lower courts, however, are not of one mind when it comes to what constitutes discriminatory enforcement.

At least two circuits have held that a finding of discriminatory enforcement requires more than a showing that a hospital had previously permitted instances of charitable or personal solicitations, conversations, or distributions. For instance, in *S. Md. Hosp. Ctr. v. NLRB*, 801 F.2d 666 (4th Cir. 1986), the Fourth Circuit denied enforcement to a Board order finding that a hospital employer had violated Sections 8(a)(1) and (a)(3) of the Act by disciplining an employee due to her union-related solicitation at a nurse's station. In so holding, the Fourth Circuit specifically rejected the concept of discrimination espoused by the Sixth Circuit and the Board in this case:

> In dismissing the hospital's explanation for the discipline, the Board relied heavily on evidence that some raffle tickets, Girl Scout cookies and cosmetics were sold by employees without reproach under the hospital's rule. The Board submits that this proves discriminatory application of the rule. However, to follow the Board's reasoning to its logical conclusion, the fact that the hospital had allowed some innocuous activity to go unpunished in the past would mean that *any* subsequent attempt by the hospital to control union solicitation in its patient care areas would have amounted to an unfair labor practice. The care of patients is too important to allow such a result.

Id. at 674.

Similarly, in *Manchester Health Ctr., Inc. v. NLRB*, 861 F.2d 50, 54 (2d Cir. 1988), the Second Circuit declined to enforce a Board order holding that a hospital employer who generally prohibited "the discussion of controversial or disruptive matters in the presence of patients," violated Section 8(a)(1) of the Act by promulgating a rule "that expressly prohibited 'solicitation or talk of union activities in patient area[s]. . . .'" The ALJ in the case had held that the

latter rule was "discriminatorily invalid because it failed to prohibit all non-work-related casual or social conversation during work time." *Id.* The Second Circuit disagreed, concluding that "the rule was not discriminatory." *Id.* To the contrary, the court stated that "[i]t simply flies in the face of common sense to argue, as did the ALJ, that a rule seeking to bring about a healing by limiting potentially explosive exchanges between employees must as a matter of law also prohibit all non-work-related casual or social conversation." *Id.*[1]

In this matter, the Sixth Circuit held that the Board's finding of discrimination was enforceable based upon "evidence that ProMedica's enforcement was lax with respect to *non-union-related* solicitation and distribution" activities such as the sale of "Tupperware, Avon cosmetics, and Girl Scout Cookies, for example." (Pet. App. 8a (emphasis added).) The Sixth Circuit expressly acknowledged that its standards conflicted with cases such as *S. Md. Hosp. Ctr.* and *Manchester Health Ctr.* (Pet. App. 11a ("This circuit's

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[1] Outside of the patient-care context, the Board's concept of "discrimination" has also met with skepticism from some courts. *See, e.g., 6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 780 (7th Cir. 2001) ("[S]olicitations for girl scout cookies, Christmas ornaments, [and] hand-painted bottles. . . certainly cannot, under any circumstances, be compared to union solicitation. . . ."). Indeed, the Sixth Circuit has rejected the Board's definition of discrimination in cases involving non-employee union organizers. *See, e.g., Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 686 (6th Cir. 2001) ("To discriminate in the enforcement of a no-solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so.") (internal citations and quotations omitted);

precedent conflicts with the Fourth Circuit's rule."). Standing alone, this difference of opinion supports the writ.

II. THIS CASE INVOLVES AN IMPORTANT QUESTION THAT DIRECTLY IMPLICATES THE PROVISION OF PATIENT CARE IN THIS COUNTRY.

What constitutes "discriminatory" enforcement of a policy prohibiting solicitation and the distribution of literature in patient care areas is an important question that impacts countless numbers of hospitals, hospital employees, and patients. ProMedica is not alone in its promulgation of a patient-care-area solicitation and distribution policy. Indeed, hospital employers from all regions of the country have issued such policies. *See, e.g.*, Larry W. Bridgesmith & John E.B. Gerth, *The Summer of Union Discontent Portends A Season of Employer Discomfort*, 39 J. Health L. 117, 138 (Winter 2006) ("Knowing when and where nonwork-related verbal solicitation and literature distribution restrictions can be enforced is critical to productivity, safety, and patient care.").

In this context, it is not surprising that there has been repeated NLRA litigation regarding the enforcement of solicitation and distribution policies, and this litigation is likely to increase in the future. Unions frequently challenge such policies as part of organizing campaigns in which they seek consent to represent employees for purposes of collective bargaining. *See generally id.* at 133, 137-38. Commentators have predicted that, with the recent division between the AFL-CIO and the Change to Win Coalition (which advocates more intense organizing efforts), the number of such campaigns is likely to rise. *See, e.g., id.* at 118, 120-23. Moreover, in the current economy, unions increasingly are aiming their organizing efforts at the health care industry. *See id.* at 123 ("There can be little doubt that the healthcare industry is a prime target for union organizing

efforts. Some unions, such as the [Service Employees International Union], have clearly stated their intention to focus on organizing workers in the industry.").

Nevertheless, the varying standards applicable to the enforcement of solicitation and distribution policies leaves employers and employees – not to mention hospital patients – on unstable ground. Hospitals in Ohio now operate under different standards in this area than those in Virginia and New York. And, although solicitation and distribution polices are widespread, neither employers nor unions can be sure when and whether they may be enforced in union-related contexts. This uncertainty over an important matter of federal law deserves review.

III. THE SIXTH CIRCUIT'S DECISION IS WRONG ON THE MERITS AND WILL HAVE DIRE CONSEQUENCES FOR EMPLOYERS, EMPLOYEES, AND PATIENTS.

As to the merits, there is little to recommend the Sixth Circuit's decision enforcing the Board's Order as to the Hazenfratz, Keckler, and Miller allegations. To begin with, the court accepted a highly strained construction of the term "discrimination." Inherent within the common legal understanding of this term is the notion that arbitrary distinctions have been drawn between persons or actions that are *similarly situated.* But there are key differences between an employee engaging in union solicitation, on the one hand, and an employee selling charity raffle tickets, on the other. This Court and the Board have both recognized that the former, infused with the strife and tensions of the workplace, is presumptively disruptive of patient care. *See, e.g., NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 778 (1979) (noting that, due to "the need to avoid disruption of patient care," bans on solicitation in patient care areas are presumptively immune to union challenges). ProMedica is aware of no authority recognizing the latter – *i.e.*, selling raffle tickets and the like

– as carrying this same presumption. As such, it makes little sense to suggest, as the Sixth Circuit and Board did in this case, that "the fact that the hospital had allowed some innocuous activity to go unpunished in the past would mean that *any* subsequent attempt by the hospital to control union solicitation in its patient care areas would have amounted to an unfair labor practice." *S. Md. Hosp. Ctr. v. NLRB*, 801 F.2d 666, 674 (4th Cir. 1986).

Moreover, and notwithstanding the acknowledged presumption that employers may bar solicitation in patient care areas, the position adopted by the Sixth Circuit and Board in this case would preclude most hospitals from ever applying such a ban as to union-related matters. *Cf. Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998) ("Because reasoned decisionmaking demands it, and because the systemic consequences of any other approach are unacceptable, the Board must be required to apply in fact the clearly understood legal standards that it enunciates in principle . . . ."). Hospitals are often sizable institutions that tend to employ large numbers of people. ProMedica, for example, employs approximately 7,300 persons in its Central Region. Further, hospitals tend to have relatively small management staffs. Federal government statistics suggest that only 1.3% of those employed in the health care field occupy medical or health service manager positions. *See* Bureau of Labor Statistics, U.S. Department of Labor, Career Guide to Industries, 2006-07 Edition, Health Care, *available at* http://www.bls.gov/oco/cg/cgs035.htm (visited December 21, 2006). This management-to-staff ratio is unlikely to change, as hospitals face ever increasing demands for their patient care services and ever increasing cost pressures. *See, e.g.*, Am. Hosp. Ass'n., *The State of America's Hospitals – Taking the Pulse* (April 2006), *available at* http://www.aha.org/aha/content/2006/PowerPoint/StateHospitalsChartPack2006.PPT (visited December 21, 2006). In

this environment, it is simply unrealistic to expect that a large hospital could hope to halt *every* instance in which an employee urged co-workers to purchase her daughter's Girl Scout cookies or raffle tickets benefiting programs at her church. Yet, this unattainable goal is precisely what, in the Sixth Circuit's and Board's view, is necessary to avoid a charge of discrimination if a hospital makes *any* attempt to halt union-related solicitation in patient care areas.

Patients, of course, would be the primary victims of a construct that renders solicitation policies largely unenforceable in the areas in which hospitals provide treatment. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978) ("[I]n the context of health care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid."). But employees and the general public likewise stand to lose from a regime that encourages employers (albeit in a Sisyphean manner) to step up efforts to rid the workplace of even innocuous charitable solicitations. For these additional reasons, the writ should be granted or, at a minimum, the Sixth Circuit's decision should be summarily reversed.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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January 2, 2007

Case Nos: 05-1660: 05-1735

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

JUDGMENT ENFORCING IN PART AN ORDER OF THE NLRB

PROMEDICA HEALTH SYSTEMS, INC., THE TOLEDO HOSPITAL, AND TOLEDO CHILDREN'S HOSPITAL

Respondents

BEFORE: RYAN and COOK, Circuit Judges; and GWIN, District Judge.*

This cause was submitted upon the petition of the National Labor Relations Board for enforcement of its order against Respondents, Promedica Health System, Inc., The Toledo Hospital and Toledo Children's Hospital, a Subsidiary of Promedica Health Systems, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, dated December 16, 2004, in Case Nos. 8-CA-31818 and 9-CA-32345, AND Promedica's cross-petition for review of the same order. The Court having considered the same, it is hereby

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

ORDERED AND ADJUDGED by the Court that the Respondents, Promedica Health Systems, Inc., The Toledo Hospital and Toledo Children's Hospital, a Subsidiary of Promedica Health Systems, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall abide by the attached order.

ENTERED BY ORDER OF THE COURT

Leonard Green Clerk

United States Court of Appeals,Sixth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner/Cross-Respondent,
v.
PROMEDICA HEALTH SYSTEMS, INC., The Toledo Hospital, and Toledo Children's Hospital,
Respondents/Cross-Petitioners.
Nos. 05-1660, 05-1735.

Filed: Oct. 5, 2006.

On Appeal for Enforcement of an Order of the National Labor Relations Board.

Before RYAN and COOK, Circuit Judges; and GWIN, District Judge.*

COOK, Circuit Judge.

The National Labor Relations Board (the "Board") petitions for enforcement of its order requiring Respondents ProMedica Health Systems, Inc., The Toledo Hospital, and Toledo Children's Hospital (collectively "ProMedica"), to cease and desist from violating the National Labor Relations Act (the "Act"), 29 U.S.C. § § 151 et seq., and to take various affirmative remedial measures.[1] ProMedica cross-

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* The Honorable James S. Gwin, United States District Judge for the Northern District of * Ohio, sitting by designation.

[1] Specifically, the Board ordered ProMedica to remove references to unlawful disciplinary actions taken against certain employees from its files, to pay damages to employees for any loss suffered as a result of discrimination, to post copies of ProMedica's violations at its facilities, and to certify that it had complied with the order.

petitions for review of the same order.[2] We grant the cross-petition for review in part and grant the petition to enforce the order in part.

I. Background

ProMedica operates several hospitals and related facilities in the Toledo area. In early 2000, the Union began organizing efforts at several of these facilities. ProMedica decided to oppose the Union's organizing efforts and toward that end hired consultants to provide labor-relations training to its managers and supervisors.

A few months later, the Union filed unfair labor practice charges with the Board against ProMedica. The Board issued a "Complaint and Notice of Hearing," based on these charges (the "Summer 2000 charges"), alleging that ProMedica violated the Act by, among other things, selectively and disparately enforcing its "no-solicitation/no-distribution" policy, discriminatorily disciplining ("coaching") employees based on their union-related activities, creating the impression of surveillance among its employees, and unlawfully threatening its employees.

Before a hearing was held on the Summer 2000 charges, the Union filed four representation petitions for employees working at ProMedica facilities. The Board then conducted elections, and the Union failed to garner a majority of the votes in any of the facilities.

Following the elections, the Union filed additional unfair labor practice charges (the "election charges") and several election objections[3] based on ProMedica's conduct during the pre-election period. Many of the election charges were

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[2] International Union, United Automobile, Aerospace and Agriculture Implement Workers of America, UAW (the "Union") intervened in support of the Board.

[3] Matters related to the election objections are not part of this appeal.

withdrawn or settled, and eventually the Board ordered a hearing on the remaining election charges and objections, consolidated with the Summer 2000 charges. The Board amended the complaint accordingly, adding allegations that ProMedica, in violation of the Act, promised employees that they would receive wage raises but later told them that the raises were being rescinded because the Union filed a representation petition.

An administrative law judge ("ALJ") held a hearing and issued a decision sustaining in part and dismissing in part the charges and recommending that ProMedica be ordered to cease and desist from the conduct found to be unlawful and to take certain affirmative remedial action. ProMedica filed exceptions to the ALJ's decision, and the Board's General Counsel filed cross-exceptions. The Board, with one member partially dissenting, "affirm[ed] the [ALJ's] rulings, findings, and conclusions and ... adopt[ed] the recommended Order," with some modifications. ProMedica refused to comply and the Board petitioned this court for enforcement of its order. ProMedica cross-petitioned for review.

II. Standard of Review

Under the Act, the scope of our review of is limited. *Vencare Ancillary Servs., Inc. v. NLRB,* 352 F.3d 318, 321 (6th Cir.2003) (citation omitted). Specifically, "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e). "Evidence is considered substantial if it is adequate, in a reasonable mind, to uphold the decision." *Vencare,* 352 F.3d at 321 (quotation omitted). And although we "consider the evidence contrary to the Board's conclusions," we "may not conduct a *de novo* review of the record." *Id.* (quotations omitted). Similarly, the Board's application of the law to particular facts is reviewed under the substantial evidence standard, although we review the Board's conclusions of law de novo. *NLRB v. Good*

Shepherd Home, Inc., 145 F.3d 814, 816 (6th Cir.1998) (citation omitted).

III. Discussion

A. Statutory Overview

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157. Section 8(a)(1) of the Act makes it an "unfair labor practice" for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]," 29 U.S.C. § 158(a)(1), and Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to ... any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

B. The Summer 2000 Charges

The complaint, in relevant part, alleges that ProMedica violated Section 8(a)(1) and (a)(3) of the Act by: selectively and disparately enforcing its "no-solicitation/no-distribution" policy (the "Policy"); discriminatorily disciplining several Union supporters because of their pro-Union activities; creating the impression that employees' union activities were under surveillance; and unlawfully threatening employees with reprisals.

1. Disciplinary Action

ProMedica argues that because coachings are not discipline they do not affect any term or condition of employment, *see Lancaster Fairfield Cmty. Hosp.*, 311 NLRB 401, 403-404 (1993) (finding that a "warning" issued to an employee was not "formal discipline," and thus did not affect "any term or condition of employment" within the meaning of the Act). Alternatively, they argue that the record

does not support the finding that it disparately enforced the Policy. We disagree with both contentions.

ProMedica maintains a progressive disciplinary system, which includes employee recognitions, "coachings," and formal levels of discipline. Though ProMedica points to several subtle distinctions between coachings and "formal discipline," we find that coachings are plainly part of ProMedica's disciplinary scheme because warnings that "lay [ ] a foundation for future disciplinary action" against employees are part of an employer's disciplinary scheme. *Trover Clinic,* 280 N.L.R.B. 6, 16 (1986).

Unlike *Lancaster,* where there was no evidence that the warning issued by the employer was "part of the [employer's] formal disciplinary procedure or ... even a preliminary step in the progressive disciplinary system," 311 N.L.R.B. at 403-04, here, substantial record evidence supports the finding that, as in *Trover Clinic,* ProMedica's coachings can and do form the "foundation for future disciplinary action." Two of ProMedica's human resources managers testified that past coachings are considered as a factor when deciding whether to issue formal discipline against an employee for later rules infractions. Moreover, ProMedica's own policy explains that coachings "can be a very effective means of solving performance problems. However, when an employee fails to respond to counseling, formal levels of discipline may be initiated." Accordingly, we conclude that the issuance of coachings constitutes disciplinary action.

We next turn to ProMedica's argument that it did not disparately enforce the Policy. In relevant part, the Policy (1) prohibits employees from soliciting "for funds, memberships or individual enlistment in outside organizations or causes at all times on work time and in immediate patient care areas"; (2) prohibits the "distribution of literature and other materials for any purpose ... during working time"; and (3) permits solicitation and distribution "during non-working

time in all non-working areas of the facility that are not immediate patient care areas."

That the parties agree the Policy is facially valid is of no moment because, as a general matter, when an employer has been lax in its enforcement of a valid no-solicitation/no-distribution rule with respect to non-union-related activity, "enforcement of the no solicitation rule so as to prohibit employees from [engaging in union-related solicitation or distribution], violates Section 8(a)(3) and (1) of the Act." *Meijer, Inc.*, 318 N.L.R.B. 50, 57 (1995) (citing *Action Auto Stores*, 298 N.L.R.B. 875 (1990)); *see also NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 945, 961 (6th Cir.2000); *NLRB v. Daylin, Inc., Discount Div.*, 496 F.2d 484, 488 (6th Cir.1974); *Clinton Elec. Corp.*, 332 N.L.R.B. 479, 501 (2000) (finding employer violated the Act by selectively and disparately enforcing its valid no-solicitation rule by applying the rule against solicitations by labor organizations, while disregarding other types of solicitations).

The record is replete with evidence that ProMedica's enforcement was lax with respect to non-union-related solicitation and distribution. The ALJ credited numerous employees' testimony describing the widespread and open non-union-related solicitation for and distribution of various commercial and charitable products-Tupperware, Avon cosmetics, and Girl Scout Cookies, for example. The employees also testified that books and catalogues offering these products were commonly left lying around work areas, including "patient care areas" (such as the nurses' station). One employee, Cynthia Miller, testified that her supervisor was commonly at the nurses' station and would have been able to see the brochures and catalogues left in the open. And another employee, Christine Gallagher, testified that people "basically walk[ed] around ... with an order form saying, 'Do you want to buy some cookies?'."

ProMedica directs our attention to deposition testimony from its supervisors and managers in an effort to demonstrate

that it consistently enforced the Policy with respect to non-union solicitations and distributions. But ProMedica's argument misses the mark. The case does not turn on how many times ProMedica enforced the policy, but on whether ProMedica consistently enforced the policy in general. ProMedica's evidence demonstrates limited enforcement efforts, and given that the ALJ's finding that "solicitations and distributions were 'commonplace,' " the evidence is adequate to uphold the lax enforcement conclusion and meets our substantial evidence test.

ProMedica also contends that there is no evidence that it intentionally ignored non-union-related violations of the Policy. But the ALJ specifically discredited ProMedica's "denials of knowledge or its claims that it assiduously and diligently enforced the policy uniformly."[4] And the Board's decision could survive even without direct evidence that ProMedica's supervisors and managers ignored non-union-related violations of the Policy. Such testimony would strengthen the case, but the ALJ's finding that non-union solicitations and distributions were "commonplace" supports the inference that Promedica had actual knowledge of the selective enforcement. *See South Nassau Cmtys. Hosp.*, 274 N.L.R .B. 1181, 1182 (finding that an employer disparately enforced its no-solicitation rule "[e]ven in the absence of direct testimony that supervisors observed [the nonunion-related] transactions" because the widespread solicitation by employees justified an inference that the employer had knowledge). Thus, substantial evidence supports the finding that ProMedica was aware of the significant volume of non-union-related solicitation/distribution and selectively and disparately enforced the Policy in violation of the Act.

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[4] In its decision, the Board "examined the record and [found] no basis for reversing" any of the ALJ's credibility determinations. ProMedica does not challenge this conclusion.

We accordingly agree with the Board's conclusion that ProMedica violated Section 8(a)(3) of the Act by discriminatorily issuing coachings to the five employees named in the complaint for engaging in pro-union-related solicitation or distribution after the Union announced its intention to organize. We find it unnecessary to recount the specific facts that led to each employee's coaching because, though the facts vary slightly, each complaining employee essentially testified that he or she received coachings for engaging in pro-Union activities that violated the Policy while ProMedica generally ignored non-Union-related violations.

When an employer's opposition to union activity motivates its decision to take adverse action against an employee, the employer will be found to have violated Section 8(a)(1) and (3) of the Act unless it can demonstrate by a preponderance of the evidence that it would have taken the same actions absent the protected conduct. *See, e.g., NLRB v. Oberle-Jordre Co.,* 777 F.2d 1119, 1120 (6th Cir.1985) (finding employer violated Section 8(a)(1) and 8(a)(3) by discharging an employee because of union membership).

Here, the ALJ found that the Board's General Counsel established a prima facie case of discrimination. *See NLRB v. Gen. Fabrications Corp.,* 222 F.3d 218, 226 (6th Cir.2000) ("'Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; ... disparate treatment of certain employees compared to other employees with similar work records or offenses; a company's deviation from past practices in [taking the adverse action]; and proximity in time between the employees' union activities and [the adverse action].' " (quoting *W.F. Bolin Co. v. NLRB,* 70 F.3d 863, 871 (6th Cir.1995))); *see also NLRB v. Transp. Mgmt. Corp.,* 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983); *Wright Line,* 251 N.L.R.B. 1083 (1980). Because ProMedica

cannot demonstrate by a preponderance of the evidence that it would have taken disciplinary action against the complaining employees absent the protected conduct, we agree, with one exception noted below, that ProMedica violated Section 8(a)(1) and 8(a)(3) of the Act by issuing the challenged coachings.

We are not persuaded by ProMedica's argument that, even if it knowingly permitted "isolated" non-union related solicitations and distributions, it did not violate the Act by enforcing the Policy against three employees (Dea Lynn Keckler, Cynthia Miller and Robert Hasenfratz), because they solicited for the Union in patient care areas. *See S. Maryland Hosp. Ctr. v. NLRB,* 801 F.2d 666, 674 (4th Cir.1986) ("The Board submits that [because raffle tickets, Girl Scout cookies and cosmetics were sold by employees without reproach] this proves discriminatory application of the rule. However, to follow the Board's reasoning to its logical conclusion, the fact that the hospital had allowed some innocuous activity to go unpunished in the past would mean that *any* subsequent attempt by the hospital to control union solicitation in its patient care areas would have amounted to an unfair labor practice. The care of patients is too important to allow such a result."). This circuit's precedent conflicts with the Fourth Circuit's rule. *See Mt. Clemens Gen. Hosp. v. NLRB,* 328 F.3d 837, 848 (6th Cir.2003) (holding that a hospital violated the Act by enforcing its rule prohibiting the wearing of union pins in patient-care areas where hospital had allowed employees to wear similar pins while caring for patients in the past, and the hospital could not justify its position that wearing union buttons would interfere with patient care).

We cannot agree, however, with one aspect of the Board's decision as it relates to the coachings. Robert Hasenfratz, a registered nurse at Flower Hospital and an open supporter of the Union's organizing efforts, was coached twice for violating the Policy. His supervisor, Barbara Staccone, issued the second coaching after another manager informed

her that an employee, Don Griffin, filed a report complaining that Hasenfratz harassed and intimated him in the hospital parking lot about signing a union authorization card. Hasenfratz denied the charge, but Staccone issued a coaching based on the information provided to her.

The ALJ found that ProMedica violated the Act by coaching Hasenfratz for engaging in union-related solicitation and rejected ProMedica's argument that the coaching was lawful because it was based on Hasenfratz's harassment and intimidation of Griffin. The ALJ found that because Staccone "accepted [Griffin's report] at face value," without interviewing Hasenfratz personally, ProMedica simply took advantage of Griffin's claim in order to interfere with Hasnefratz's Union-related activities.

But as ProMedica persuasively argues, the ALJ discounted the investigation undertaken by Robert Czyzewski, the hospital's security supervisor. Czyzewski testified that after hearing of the incident he went to the parking lot to speak with Hasenfratz, encountered Hasnefratz in the parking lot soliciting for the Union (which was permissible because Hasenfratz was off-duty and in a non-work area), and asked Hasenfratz about the "Griffin incident," to which Hasenfratz responded, "Nothing happened." Czyzewski testified that he then spoke to Griffin to confirm the contents of Griffin's written statement about the incident. Czyzewski prepared a written report, which he sent, along with Griffin's written statement, to Human Resources. After seeing the reports, Sandra Fiock (the Human Resources Manager) testified that she then contacted Staccone and directed her to contact Hasnefratz and to coach him regarding this situation, which Staccone did.

The ALJ erroneously concluded that "Czyzewski elected not to interview Griffin," and faulted Staccone and Fiock for not interviewing him, commenting that if they had "bothered" to interview Griffin again, "as opposed to relying on hearsay hysterics," then "perhaps Hasnefratz would not

have been counseled at all." Neither the Board nor the Union briefing supports the notion that such a "reinvestigation" would have been necessary, given the investigation Czyzewski performed.

Given the evidence of ProMedica's investigation of the incident in advance of its issuing Hasenfratz a formal coaching based on what it determined to be Hasenfratz's harassing and intimidating behavior-behavior the Board does not argue is protected-we grant the cross-petition for review with respect to Hasenfratz's second coaching. And we grant the petition to enforce the remainder of the disciplinary issues contained in the order.

2. Creating an Impression of Surveillance

"An employer who creates the impression that its employees' union activities are under surveillance violates Section 8(a)(1) of the Act." *NLRB v. Benteler Indus.*, No. 97-5588, 1998 U.S.App. LEXIS 15139, at *16 (6th Cir. July 1, 1998) (citing *NLRB v. Aquatech,* 926 F.2d 538, 544 (6th Cir.1991). The Board's test for determining whether an employer has created an impression of surveillance asks "whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance." *Tres Estrellas do Oro,* 329 N.L.R.B. 50, 51 (1999); *United Charter Serv.,* 306 N.L.R.B. 150 (1992). The test does not look at the subjective belief of the employee. *MTD Prods., Inc.,* 310 N.L.R.B. 733, 742 (1993).

The ALJ found that ProMedica unlawfully created the impression that Hasenfratz's and fellow-employee Billie Smith's union activities were under surveillance. With respect to Hasenfratz, a divided Board found that Hasenfratz could reasonably conclude that his union activities were under surveillance because: 1) he received his first coaching only a short time after his name and pro-union statements appeared in a local newspaper article; 2) ProMedica refused to disclose the name of the person accusing Hasenfratz of

violating the Policy; and 3) ProMedica "undertook little or no investigation." The Board relied primarily on *Avondale Industries,* 329 NLRB 1064 (1999):

> A supervisor's calling an employee away from other employees and then telling him that his prounion sympathies were known, but refusing to tell the employee, when asked, how that knowledge was gained, is an action designed to convey to that employee that the information was gained by stealth, and unlawful means, not observation of open and obvious activity (such as [employee's] bumper sticker) .... It violat[es] Section 8(a)(1), [by] creat[ing] the impression of surveillance in an employee.

Id. at 1265 (emphasis added).

Here, as with the employee in *Avondale,* Hasenfratz openly engaged in pro-union activities. But because his supervisor (Staccone) refused to disclose the source of her knowledge-only telling Hasenfratz that a complaint had been filed-she conveyed the message that she obtained the information by stealth and thus created the impression of surveillance, leaving "undispelled the inference that the source of the complaint was a member of management or an employee recruited to spy on Hasenfratz's union activity." That Staccone told Hasenfratz that a complaint had been filed whereas the employer in *Avondale* did not is a distinction without significance. We do not believe, as ProMedica argues, that "any reasonable employee would understand that [ProMedica was] simply protecting the confidentiality interests of the complainer." Likewise, that Hasenfratz's pro-union comments were published in a newspaper article is not a meaningful distinction because the employee in *Avondale* was also an open union supporter.

Given our decision to enforce this portion of the Board's order, we find it unnecessary, as did the majority of the Board, to pass on the other allegations of creating an

impression of surveillance.[5] We grant the petition to enforce the order with respect to the surveillance issue.

3. Threats of Reprisal

An employer violates Section 8(a)(1) of the Act by threatening employees with reprisals for engaging in protected activity. *Wilkie Co. v. NLRB,* 55 Fed. Appx. 324, 327 (6th Cir.2003) (citing *NLRB v. Okun Bros. Shoe Store, Inc.,* 825 F.2d 102, 105-06 (6th Cir.1987). "The test for determining whether an employer's [statement or conduct constitutes an unlawful threat is whether the statement or conduct] tends to be coercive or tends to interfere with the employees' exercise of their rights." *Okun Bros.,* 825 F.2d at 105. This is an objective test, requiring the Board to consider the total context in which the challenged conduct occurs; and the Board is justified in viewing the issue from the standpoint of its impact upon the employees. *Id.*

The ALJ found, and the Board agreed, that ProMedica threatened two of its employees, Billie Smith and Marjorie Smith. Billie Smith, a housekeeper at Flower Hospital, was quoted in the same newspaper article that quoted Hasenfratz as favoring the Union. A week later, Billie was called into the office of Gerald Fletcher, Flower's Director of Environmental Services, where Billie's immediate supervisor, Joyce Wilkerson, was also present. Fletcher told Billie that an unnamed source complained that she had solicited for the Union while on the job. Billie denied soliciting, but admitted she had talked with other employees

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[5] As part of the remedy, ProMedica was ordered to cease and desist from "[c]reating the impression among their employees that their union activities were under surveillance," and was ordered to post a notice to this effect "in conspicuous places." ProMedica was not required to specifically name any employees as part of the order, and accordingly, so long as there is one instance of surveillance the remedy will be unaffected by findings of additional violations.

about the Union while working. Fletcher then coached Billie and told her to converse with other employees during non-working time only because he "did not want to see her get into any trouble."

We agree that Fletcher's warning not to talk to other employees on the job about the Union constituted an implied coercive threat. As the ALJ noted, Fletcher and Billie had little contact with each other prior to their meeting (Fletcher was not Billie's immediate supervisor), and the ALJ discredited Fletcher's testimony that he was "only looking out for his employees." Given the circumstances surrounding Fletcher's statements-a high-level supervisor meeting with an employee whom he does not know well, where the supervisor coaches the employee based on an anonymous complaint about the employee's solicitation for the Union-and given that the ALJ discredited Fletcher's testimony, we find that substantial evidence supports the finding that from Billie's standpoint, Fletcher's statements were coercive and thus that ProMedica violated Section 8(a)(1) of the Act.

The ALJ also found that Kerry Loe, Toledo Hospital's patient care supervisor, made coercive statements to Marjorie Smith. But because it is unclear whether ProMedica properly challenged this finding,[6] and because additional violations will not affect the remedy,[7] we decline to reach

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[6] The Board's decision notes that "there are ... no exceptions to the judge's recommendation to overrule Objection 23, which alleges that [ProMedica], through ... Kerry Loe, made coercive statements to ... Marjorie Smith," though it appears ProMedica did take exception to this finding in paragraph 77 of its "Exceptions to the ALJ's Decision" document filed with the Board.

[7] As with the surveillance charges, the Board ordered ProMedica to cease and desist from threatening employees. Accordingly, so long as there is one violation, any additional violations would only be cumulative and would not affect the remedy.

this issue. We grant the petition to enforce the order with respect to this issue.

C. The Election Charges

The Board found that ProMedica violated Section 8(a)(1) by inappropriately commenting on the likely impact that the Union election would have on a promised wage increase. We grant ProMedica's cross-petition for review of this issue, finding that substantial evidence does not support the Board's decision.

1. Events Surrounding the Wage Increase

Sean McClure, the acting director of ProMedica's clinical lab, noted the lab's unusually-high turnover rate and recruitment problems, and identified as a culprit the low salaries ProMedica paid to the lab's pre-analytical technicians ("PTs"). He reported his findings to ProMedica's compensation council, and the council agreed that a raise was in order. But ProMedica's executive council needed to sign off on the raise before it could be implemented.

After meeting with the compensation council, but before the executive council acted, McClure asked for and received his supervisor's permission to tell the PTs "that the wage increase was being approved." He then instructed two ProMedica personnel, Gloria Florence and Wendy Purcell, "to tell the PTs that the wage increase had been approved."

After the Union filed its representation petitions, however, ProMedica worried that it could not lawfully implement the raise until after the election. McClure notified a PT Supervisor, Barbara Newman, that the raise was "on hold" until after the Union election and Newman relayed the message to the PTs. Similarly, McClure announced at a staff meeting that, on the advice of counsel, ProMedica was not granting the raise at this time, that the matter was with the lawyers, and that he was not sure what would happen.

Francis Walsh, ProMedica's medical director, spoke to about 50 employees and discussed the raise. He told the

employees that the raise had been approved in principle, but could not be immediately implemented. He also informed them that, "upon completion of the organizing campaign, irrespective of whether the Union was accepted or rejected, the raise could be brought up again either to be implemented or to be part of the collective-bargaining process."

The ALJ found that ProMedica acted "in good faith and after careful consideration of the applicable law," but nevertheless concluded that ProMedica violated the Act because the employees "could reasonably conclude they now were not getting their promised wages because of the Union's filing of the election petitions." The ALJ continued: "Walsh's statements could be interpreted by employees to mean that implementation of the increases would be vouchsafed by a union loss."

In affirming the ALJ by a two-to-one vote, the Board concluded that ProMedica violated the Act by implying that only a union defeat in the election could guarantee the implementation of the wage increase. Specifically, the Board relied on Walsh's statement that, after the election, "the raise could be brought up again either to be implemented or to be part of the collective-bargaining process."

2. Discussion

A violation of Section 8(a)(1) of the Act occurs "when substantial evidence demonstrates that the employer's statements, considered from the employees' point of view, had a reasonable tendency to coerce." *Dayton Newspapers, Inc. v. N.L.R.B.*, 402 F.3d 651, 659 (6th Cir.2005). Employers violate this section if they promise benefits to employees for rejecting a union. *V & S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 278 (6th Cir.1999). A subsidiary rule is that employers may not "state that a previously announced wage increase will probably be lost if a union wins." *Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 131 (D.C.Cir.2004) (agreeing with the Board that the employer engaged in coercive conduct by circulating a campaign flyer

stating that a previously-announced ten-percent raise "was 'WHAT ... YOU HAVE TO LOSE if the Union wins the election' " and noting that the flyer " 'explicitly state [d] that the promised wage increase [would] be put in jeopardy if the employees [chose] the Union' "). As the Board noted, "statements ... convey a threat of loss of existing benefits if they reasonably 'leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore.' " (NLRB Dec. at 3 (quoting *Earthgrains Co.*, 336 NLRB 1119, 1119-20 (2001)). On the other hand, employers may permissibly notify employees that, if the union were to win an election, "negotiations would start 'from zero' or 'from scratch.' " *NLRB v. St. Francis Healthcare Centre,* 212 F.3d 945, 956 (6th Cir.2000). The appropriateness of such a statement depends on "the timing of the statement, the opportunity of the union to respond, and the content of the union's responses." *Id.*

The parties acknowledge that an employer may properly delay a wage increase under certain circumstances, *see Sara Lee Bakery Group, Inc. v. NLRB,* 61 Fed.Appx. 1, 11 (4th Cir.2003), and here the Board took issue not with ProMedica's delay in implementing the raises but with the statements that ProMedica made in explaining the delay. The Board was concerned that Dr. Walsh's statements conveyed the impression that "the PT wage increase could be in jeopardy if the employees selected union representation, but would be secure if the Union lost the election." We agree with ProMedica that the Board's finding lacks substantial evidentiary support. The immediate context of Walsh's statements belies the Board's conclusion that the statements would have a coercive effect on a reasonable employee. Walsh made clear ProMedica's desire to raise wages regardless of the electoral outcome. According to the Board,

Walsh explained that a market adjustment of PT wages had been approved in principle by the hospital, but because of the Board's Rules, no raise could be implemented at this

time. He added that, upon completion of the organizing campaign, *irrespective of whether the Union was accepted or rejected,* the raise could be brought up again either to be implemented or to be part of the collective-bargaining process.

(Emphasis added.) The clear thrust of Walsh's comment was that, one way or another, ProMedica wanted to see the raise happen after the election. Walsh's brief explanation that the appropriate means of increasing wages post-election depended upon the outcome did not imply that ProMedica's *intentions* hinged on the outcome. His statements, viewed in context, could not have improperly influenced a reasonable employee and, as a result, did not violate the Act. Accordingly, we grant ProMedica's cross-petition for review on this issue and deny the Board's petition for enforcement.

IV. Conclusion

For the foregoing reasons, we grant ProMedica's cross-petition for review with respect to the portions of the order finding that ProMedica violated the Act by issuing the second coaching to Hasenfratz and by making the "on-hold" announcement regarding the wage increase, and we grant the Board's petition for enforcement of the remainder of the order.

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

PROMEDICA HEALTH SYSTEMS, INC.
AND
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW THE OLEDO HOSPITAL AND TOLEDO CHILDREN'S HOSPITAL, A SUBSIDIARY OF PROMEDICA HEALTH SYSTEMS, INC.
AND
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW
Case 8-CA-31818, 8-CA-32345, 8-RC-16175, and 8-RC-16176

December 16, 2004

DECISION, ORDER, CERTIFICATION OF RESULTS, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On May 6, 2003, Administrative Law Judge Earl E. Shamwell, Jr. issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel and the Union each filed an answering brief. In addition, the General Counsel filed cross-exceptions and a supporting brief, and the Respondents filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified and set forth in full below.[2]

Background

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[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that the Respondents did not engage in unfair labor practices and/or objectionable conduct by implementing a 401(k) pension plan, by telling an employee that they maintained a list of employees active in the Union; by promising wage increases to dissuade certain employees from supporting the Union (which was part of the catchall objection); or by threatening employees with more restrictive leave policies and discharge for striking. There are also no exceptions to the judge's recommendation to overrule Objection 23, which alleges that the Respondents, through their Patient Care Supervisor Kerry Loe, made coercive statements to employee Marjorie Smith.

In adopting the judge's finding that the Respondents violated Sec. 8(a)(3) of the Act by enforcing their no-solicitation rule against employees Dea Lynn Keckler and by issuing Keckler a verbal coaching on June 4, 2000, we note in particular that these findings of violations are warranted even absent evidence that the Respondents permitted nonunion solicitation after the commencement of the union campaign.

[2] We shall modify the judge's recommended order to sever the representation case in Case 8-RC-16176 from the unfair labor practice proceeding, and to specify that the Respondents are not required to post a notice at its Goerlich Center, where no violations were committed. See *Consolidated Edison Co. of New York*, 323 NLRB 910, 911-912 (1997) (Board's usual practice is to post notice at locations at which the violations were committed). See also *Rose-Terminix Exterminator Co.*, 315 NLRB 1283, 1289 (1995).

The Respondents operate not-for-profit acute health care and related facilities. Its central region includes the Toledo Hospital, Flower Hospital, the Goerlich Center, North Campus Laboratory, and the Toledo Children's Hospital. It employs 7300 employees in the central region, 200 of whom are managers or supervisors.

In early 2000, the Union began to organize several of the Respondents' facilities, including the Toledo and Flower Hospitals and the Goerlich Center. On February 14, 2001, the Union filed four separate representation petitions for the following units: skilled maintenance, nursing, technical, and support services. All four units are at the main Toledo campus. No petitions were filed for the employees working at Flower Hospital or the Goerlich Center. A stipulated agreement was entered into and the elections were held on April 4, 5, and 6, 2001. The tally of ballots shows that a majority of ballots were cast against the Union in all of the units. The objections considered in this case pertain to the elections held in the technical and support services units.

1. The Respondents' coachings

The Respondents maintain a progressive disciplinary policy (policy 600), which provides for employee recognitions and performance counseling (also referred to as coaching). It also provides for formal levels of discipline, and for a timeframe for presenting discipline.

The judge found, and we agree, that the Respondents violated Section 8(a)(3) of the Act by issuing coachings to employees Dea Lyn Keckler, Robert Hasenfratz, Christine Gallagher, Billie Smith, and Cynthia Miller, directed at their union activity. In their exceptions, the Respondents contend that these coachings did not violate Section 8(a)(3) because they were not disciplinary actions. We find no merit to this contention. As explained by the judge, the record demonstrates that coachings play a significant role in the Respondents' progressive disciplinary process. Thus, if an employee has received a coaching or counseling for a

particular infraction, that coaching or counseling is taken into consideration in determining whether further discipline is warranted, and the nature of that discipline, for future infractions. The Board has found that warnings and reprimands of this nature are part of a disciplinary process in that they lay "a foundation for future disciplinary action against [the employee]." *Trover Clinic*, 280 NLRB 6, 16 (1986).

Lancaster Fairfield Community Hospital, 311 NLRB 401 (1993), cited in support by the Respondents, is clearly distinguishable. In that case, the Board found that an employer did not violate Section 8(a)(3) by issuing a "conference report" to an employee for wearing a union pin, because there was no evidence that the conference report was "even a preliminary step in the progressive disciplinary system." Id. at 403. Here, however, the Respondents' coaching of employees is duly considered when future discipline is contemplated. Thus, the coachings are clearly part of the disciplinary system, unlike the conference reports at issue in *Lancaster,* supra. Accordingly, we adopt the judge's finding that the Respondents' coaching of employees for engaging in protected activity violated Section 8(a)(3).

2. Creation of impression of surveillance

We adopt the judge's finding that the Respondents violated Section 8(a)(1) of the Act by creating the impression of surveillance of employee Robert Hasenfratz' union activities.[3] The credited testimony shows that Hasenfratz became active in the union campaign in April 2000. His activity included soliciting signatures on authorization cards. In an interview in The Toledo Blade, published May 12,

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[3] In view of this finding, we find it unnecessary to pass on the other allegations of creating the impression of surveillance, because any findings of such additional violations would be cumulative and would not affect the remedy.

2000, Hasenfratz was quoted as making favorable comments about the Union. On May 17 or 18, 2000, Hasenfratz met with his supervisor, Barbara Staccone. Staccone told Hasenfratz that someone had complained about his soliciting "something" about the Union. Hasenfratz asked Staccone who had made the complaint, but Staccone replied that she was not comfortable naming the person. Staccone said that the soliciting had caused a decrease in productivity and patient care, including a decline in patient satisfaction.

The judge found that Staccone's comments created the impression that Hasenfratz' union activities were under surveillance. In support, the judge explained that Staccone's comments were made shortly after the Hasenfratz interview appeared in the local newspaper, that Staccone refused to disclose the name of the person who had made the complaint, and that the Respondents undertook little or no investigation of the report of Hasenfratz' conduct.

We agree with the judge's finding. In *Avondale Industries*, 329 NLRB 1064, 1265 (1999), the Board found that an employer created the unlawful impression of surveillance when a supervisor told an employee that the employee's prounion sympathies were known, and that he would not disclose to him how he received this information. The Board adopted the judge's finding that the refusal to tell the employee how the information was gained was "an action designed to convey to that employee that the information was gained by stealth and unlawful means." Id. Similarly, Staccone made it clear to Hasenfratz that she knew about Hasenfratz' union activity, but refused to disclose the source of her knowledge. As in *Avondale*, supra, these comments reasonably conveyed to Hasenfratz the impression that his union activity was under surveillance.

In arguing that Staccone's comments did not create the impression of surveillance, our dissenting colleague contends that *Avondale*, supra, is distinguishable because, here, Staccone told Hasenfratz that a complaint had been made

about his union activity, whereas in *Avondale*, the supervisor did not even divulge whether a complaint had been made. This is a distinction without significance. In *Avondale*, as here, the supervisor refused to reveal his source of the knowledge of the union activity. In both circumstances, the refusal to reveal the source could reasonably create the impression that the information was obtained by management surveilling the employee's protected activity. Accordingly, we adopt the judge's finding that the Respondents violated Section 8(a)(1) by creating the impression of surveillance of Hasenfratz' union activity.

3. Statements about a wage increase

The judge found, and we agree, that the Respondents violated Section 8(a)(1) by telling employees that a previously promised wage increase was placed on hold because the Union had filed an election petition.

As set forth in detail in the judge's decision, the credited testimony shows that in June 2000, the Respondents' compensation council determined that there were significant recruitment and retention issues in several classifications which, if not addressed, could lead to a lack of competitiveness and a loss of patients. To that end, the acting director of the Respondents' clinical laboratory, Sean McClure, initiated a study that, among other things, identified a problem with the wages of the preanalytical technicians (PTs) in the clinical laboratory.

In January 2001,[4] McClure reported to the council that a market equity issue existed with respect to the PTs' wages. The council agreed in principle with McClure, but asked him to refine his report and present it to the council in 2 weeks. McClure met again with the council around February 14. At that meeting, there was a general agreement on the need for

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[4] All dates hereafter are in 2001, unless stated otherwise.

some adjustments in the wages of the PT classification. However, the council remained concerned about McClure's approach to resolving the wage discrepancy inasmuch as it differed from an approach the council previously had used when addressing wage issues associated with the Respondents' registered nurses. The council expressed its belief that the wage adjustment for PTs needed to be consistent with that precedent in order to win approval from the Respondents' executive council (the Respondents' ultimate corporate approving body). McClure was instructed to revise the proposal consistent with that precedent.

After this meeting, McClure asked for, and received, permission to tell the PTs that the wage increase was being approved. McClure then instructed Technical Coordinator Gloria Florence and Supervisor Wendy Purcell to tell the PTs that the wage increase had been approved. Pursuant to these instructions, Florence told some of the PTs that the wage increase was going to happen, but that the details were still being worked on. In addition, Florence told PT Sherrie Schreiner and a coworker that they were going to get a 15-percent pay increase, effective their second paycheck in March.

Meanwhile, on February 18, the compensation council learned that the Union had filed the election petitions (the PTs are included in the petitioned-for support services unit). The council decided that, while it agreed on the need for McClure's proposed wage increase, the implementation of it would not be appropriate at this time. Around the end of February or early March, the Respondents' executive council approved the funding of the proposed wage increase, but decided not to implement it in light of the election petitions.

In late February, McClure told Supervisor Barbara Newman that the wage increase for the PTs was being put on hold until after the election. After that, Newman convened employees and told them that the wage increase was put on hold. After this announcement by Newman, when employees

asked Supervisor Wendy Purcell about the wage raise, she told them that the raise was approved but could not be implemented.

In early March, at a laboratory staff meeting of about 30 employees, McClure announced in the main work area of the north campus lab that, on advice of the Respondents' lawyers, the pay increase was not being granted at this time. From time to time thereafter, employees asked McClure about the raise, and he responded that the matter was with the lawyers and he was not sure what would happen.

On March 19, the Respondents' medical director, Francis Walsh, met with approximately 50 employees from both the petitioned-for support service and technical units. Walsh told the gathered employees that, upon advice from the Respondents' lawyers, employees would not be getting their anticipated raise, because the petitions had been filed. Walsh explained that a market adjustment of PT wages had been approved in principle by the hospital, but because of the Board's Rules, no raise could be implemented at this time. He added that, upon completion of the organizing campaign, irrespective of whether the Union was accepted or rejected, the raise could be brought up again either to be implemented or to be part of the collective-bargaining process.

The judge found that the Respondents violated Section 8(a)(1) of the Act by announcing the withholding of the PT wage increase after the filing of the petition and the commencement of the Union's campaign. The judge found that the Respondents created great anticipation in the minds of the PTs that a raise for the PTs was "in the bag." The judge specifically relied on the fact that Florence told employee Schreiner that the PTs were getting a 15-percent raise effective the second paycheck in March. The judge further found that employees thereafter could reasonably interpret Walsh's statements as meaning that the PTs were not getting the anticipated wage increase because of the

Union's election petitions, and that implementation of the wage increase "would be vouchsafed by a union loss."

We agree with the judge's finding. It is well settled that conditions of employment include not only what an employer has already granted, but also what the employer has proposed to grant. *Liberty Telephone & Communications*, 204 NLRB 317 (1973). Thus, an employer violates Section 8(a)(1) by telling employees that the implementation of an anticipated wage increase may be in doubt due to the obligation to engage in collective bargaining with a union after an election. E.g., *Earthgrains Co.*, 336 NLRB 1119 (2001), enfd. sub nom. *Sara Lee Bakery Group, Inc. v. NLRB*, 61 Fed.Appx. 1 (4th Cir. 2003) (unpublished). Such statements reasonably convey a threat of loss of existing benefits if they reasonably "leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Earthgrains*, supra at 1119-1120; *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. 679 F.2d 900 (9th Cir. 1982).

Here, the facts show that the Respondents, through the actions of McClure, informed employees that the PTs would soon receive a wage increase. Thereafter, following the filing of the election petitions, the Respondents' medical director, Francis Walsh, informed employees that the wage increase would be implemented if the Union lost the election, but the wage increase would be made part of the collective-bargaining process if the Union won the election. We agree with the judge that these comments reasonably conveyed to employees that the PT wage increase could be in jeopardy if the employees selected union representation, but would be secure if the Union lost the election.

Our dissenting colleague finds that the Respondents' statements were not unlawful. He contends, in essence, that the Respondents, through Walsh, cleared up any misinformation and accurately told employees that the wage

increase was in the planning stage, and that the Respondents would continue its planning after the election. We disagree. The Respondents did far more than inform employees that there were plans to address a wage increase. The Respondents' statements left employees with the clear impression that a wage increase for the PTs was going to occur, but that a union victory might jeopardize that occurrence by virtue of it being subject to the collective-bargaining process. The Respondents accordingly violated Section 8(a)(1) as alleged.

4. The objectionable conduct

The judge further found that the Respondents' announced withholding of the PT wage increase constituted objectionable conduct. In so finding, he set aside the election in both the support services unit, in which the PTs were included, and the technical unit. The judge reasoned that although the Respondents' announcement concerning the wages in the PT job classification directly affected employees only in the support services unit, the announcement was "potentially poisonous to other job classifications" in the technical unit as well.

We agree with the judge that the Respondents' announcement constituted objectionable conduct. See *Deaconess Medical Center*, 341 NLRB No. 79 (2004) (employer engaged in objectionable conduct when, after telling employees that a previously implemented wage reduction would be restored when the employer regained financial stability, further told employees that it could not easily restore the wages if employees were represented by the union). As explained above, the PTs in the support services unit could reasonably believe from Walsh's statements that their raise could be secured only if they voted not to be represented by the Union. Further, the record shows that the issue of the PTs' wage increase was a topic of much discussion among many of the employees in the support

services unit. Accordingly, we adopt the judge's recommendation to set aside the election in that unit.

Contrary to the judge, however, we find that there is no basis on this record to find that the Respondents' conduct warrants setting aside the election in the technical unit. While the record shows that some employees from the petitioned-for technical unit were present at employee meetings when statements about the PTs' wage increase were made, the record is not clear as to the number of employees in attendance. Further, there is no evidence suggesting that the employees in the technical unit viewed this matter (including the reasons for addressing the PTs' wages, the proposal to address the market equity concerns, and the subsequent decision to hold off implementation) as one that could have an impact on their own wages. In view of this lack of evidence, we are unable to conclude that the Respondents' statements about putting on hold the PTs' wage increase destroyed the laboratory conditions of the election in the technical unit. Accordingly, we shall overrule the objection as it relates to the technical unit and certify the results of the election in Case 8-RC-16176.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondents, Promedica Health Systems, Inc., The Toledo Hospital and Toledo Children's Hospital, a Subsidiary of Promedica Health Systems, Inc., Toledo, Ohio, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals because of their union activities, sympathies, or support.

(b) Enforcing their solicitation, distribution, and loitering policy selectively and disparately; that is, by restricting union-related solicitations and distributions while not

likewise restricting nonunion-related solicitations and distributions.

(c) Creating the impression among their employees that their union activities were under surveillance.

(d) Coercively informing their employees that they should terminate their employment with the Respondents if they supported the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other labor organization.

(e) Informing employees that a wage increase previously promised them was being placed on hold because the Union filed a petition seeking to represent them.

(f) Discriminatorily issuing disciplinary coachings to employees because of their support or activities on behalf of the Union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from their files any reference to the unlawful disciplinary counselings/coachings issued to Billie Smith, Robert Hasenfratz, Dea Lynn Keckler, Cynthia Miller, and Christine Gallagher and, within 3 days thereafter, notify each of them in writing that this has been done, and that the disciplinary actions will not be used against them in any way.

(b) Within 14 days from the date of this Order, make Billie Smith, Robert Hasenfratz, Dea Lynn Keckler, Cynthia Miller, and Christine Gallagher whole for any loss of earnings and benefits suffered by them a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days after service by the Region, post at their facilities in Toledo, Ohio, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since May 1, 2000.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply with this Order.

CERTIFICATION OF RESULTS OF ELECTION IN CASE 8-RC-17175

It is certified that a majority of the valid ballots have not been cast for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and that it is not the exclusive representative of the

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[5] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees in the bargaining unit in the above-designated case.

DIRECTION OF SECOND ELECTION IN CASE 8-RC-17176

It is ordered that Case 8-RC-17176 is severed and remanded to the Regional Director to conduct a second election when he deems the circumstances permit a free choice. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible

voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. December 16, 2004

Wilma B. Liebman

Member

Dennis P. Walsh

Member

CHAIRMAN BATTISTA, dissenting in part.

Contrary to the judge and my colleagues, I do not find that the Respondents violated Section 8(a)(1) of the Act by creating the impression of surveillance, or by making statements regarding the withholding of wage increase for the Respondents' preanalytical technicians (PTs). I also find that the statements about the wage increase did not constitute objectionable conduct.

Creation of Impression of Surveillance Allegations

1. My colleagues adopt the judge's finding that the Respondents created the impression of surveillance of employee Robert Hasenfratz' union activities. They base this on the fact that Supervisor Barbara Staccone approached Hasenfratz, told him that someone had complained about his solicitation for the Union, but refused to disclose the identity of the person who had made the complaint. I disagree.

As an initial matter, I note that Hasenfratz had made prounion statements in a general circulation newspaper. Thus, his prounion activity was hardly secret. There was no reason for the Respondents to spy on him, or for him to fear that he was being spied upon.

Even more importantly, the Respondents made it clear to Hasenfratz that the reports of his union activity came from a complaint made to the Respondents. Thus, any reasonable employee would understand that the bases for the Respondents' remarks were complaints from others rather than spying.

Further, the fact that the Respondents would not reveal the name of the complainer does not undercut the Respondents' statement that it had received a complaint. In any event, that refusal to disclose does not automatically lead to a conclusion that there has been spying. To the contrary, any reasonable employee would understand that the Respondents were simply protecting the confidentiality interests of the complainer.

My colleagues' reliance on *Avondale Industries,* 329 NLRB 1064, 1265 (1999), is unavailing. In that case, a supervisor told an employee that he knew that the employee was a union supporter, but refused to tell the employee how he received the information. The supervisor refused to disclose *anything* about how the information was obtained. Thus, the employee could reasonably presume that "the information was gained by stealth and unlawful means." Id. Here, Staccone *did* reveal how the Respondents received this information. She told him that the information had been received via a complaint that had been brought to management. Although she did not reveal the source of the complaint, her comments do not reasonably suggest that the Respondents obtained the information by "stealth and unlawful means."

In sum, because Staccone made no comment reasonably creating the impression that the Respondents were surveilling Hasenfratz' union activity, I would dismiss this allegation.

2. My colleagues do not pass on the judge's finding that the Respondents created the impression of surveillance of employee Billie Smith's union activity. For reasons similar to those discussed above, I would reverse the judge's finding.

The record shows that the Respondents' director of environmental resources, Gerald Fletcher, called Smith into a meeting and told her that an unnamed source in the dietary department said that Smith had been soliciting while on the job. Smith denied soliciting, but admitted to talking about the Union while working. Fletcher told her he did not wish to see her hurt, and that she should only converse with employees during nonworking times such as while on break.

I disagree with the judge that Fletcher's remarks reasonably conveyed that the Respondents or their agents surveilled Smith's union activity. Rather, like Staccone's remarks discussed above, Fletcher's comments reasonably suggested nothing more than the fact that *someone* had

brought this information to Fletcher's attention. Without more, Fletcher's statements are devoid of any suggestion that information was gathered through surveillance of Smith's union activity.[1]

Statements About the Wage Increase

My colleagues find that the Respondents violated Section 8(a)(1) and engaged in objectionable conduct by informing employees that a wage increase was being put on hold because of an election petition. I disagree.

The facts are undisputed. In June 2000, the Respondents' compensation council began addressing certain issues concerning recruitment and retention in several classifications. The Respondents' acting director, Sean McClure, performed a study of wages in the clinical laboratory and identified wage problems with the preanalytical technicians (PTs). On January 25, 2001,[2] McClure presented to the council a market equity report regarding the preanalytical technicians. The council asked McClure to refine his report and return in 2 weeks. At a meeting on February 14, the council directed McClure to resolve the wage discrepancy by using the market-based approach the council previously had used in dealing with wage issues concerning the registered nurses. Thereafter, McClure worked with Compensation Council Chairman Jeff Keller to revise the proposal into a form that the Respondents' executive council would approve.

On February 14, the RC petitions were filed. About February 18, the compensation council became aware of the filing of these petitions. Ultimately, the wage adjustment was

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[1] For the reasons set forth in the judge's decision, and consistent with my findings herein, I adopt the judge's dismissal of the other allegations of creation of impression of surveillance.

[2] All dates hereafter are in 2001, unless stated otherwise.

not approved. The Respondents explained to theirs employees that because of the petitions and upon advice of counsel, the wage adjustments would not be made at that time. The Respondents also explained that if the Union lost, the wage adjustment would be made. If the Union won, the matter would be addressed in bargaining.

I disagree with my colleagues and the judge that the Respondents' statements were unlawful. Concededly, at the time that the Respondents learned that a petition had been filed, plans for a wage increase for the PTs were well underway. However, final approval of the plan and its implementation had not occurred.[3] Thus, the Respondents acted appropriately in not taking further action on a wage plan that had not been fully finalized at the time the petition had been filed. That is, if the wage adjustment had been given, the Respondents would face the allegation that the adjustment was an unlawful and objectionable benefit granted during the critical period.

Further, the statements themselves reflected current law. Once the election matter was resolved, the Respondents would be free to unilaterally grant the increase if the Union lost, and the Respondents would be obligated to bargain about the matter if the Union won. The Respondents told employees the truth. That is neither unlawful nor objectionable.

Dated, Washington, D.C. December 16, 2004

Robert J. Battista

Chairman

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[3] The erroneous comments of Technical Coordinator Gloria Florence (that the wage increase was going to happen) were corrected by the Respondent's explanation that implementation of the wage increase had not been approved, and the matter would not come up again until after the election.

APPENDIX

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not threaten you with unspecified reprisals because of your union activities, sympathies, or support.

We will not enforce our solicitation, distribution, and loitering policy selectively and disparately; that is, by restricting union-related solicitations and distributions while not likewise restricting nonunion-related solicitations and distributions.

We will not create the impression among you that your union activities are under surveillance.

We will not coercively inform you that you should terminate your employment with us if you support the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other labor organization.

We will not inform you that a wage increase previously promised you is being placed on hold because the Union filed a petition seeking to represent you.

We will not discriminatorily issue disciplinary coachings to you because of your support of and activities on behalf of the Union.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will, within 14 days from the date of this Order, remove from our files any reference to the unlawful disciplinary counseling/coachings issued to Billie Smith, Robert Hasenfratz, Dea Lynn Keckler, Cynthia Miller, and Christine Gallagher and, within 3 days thereafter, notify them, in writing, that this has been done and that the disciplinary actions will not be used against them in any way.

We will, within 14 days from the date of this Order, make Billie Smith, Robert Hasenfratz, Dea Lynn Keckler, Cynthia Miller, and Christine Gallagher whole for any loss of earnings and benefits suffered by them as a result of the discrimination against them.

Promedica Health Systems, Inc.

Allen Binstock, Esq. and *Iva Choe, Esq.*, for the General Counsel.

G. Roger King, Esq., Coleen A. Deep, Esq., E. Michael Rossman, Esq. and *Andraea D. Carlson, Esq. (Jones, Day, Reavis, and Pogue)*, of Columbus, Ohio, for the Respondent.

Joan Torzewski, Esq. (Lackey, Nusbaum, Harris, Reny, and Torzewski), of Toledo, Ohio, for the Charging Party.

DECISION

Statement of the Case

EARL E. SHAMWELL JR., Administrative Law Judge.

This case was heard before me on October 16, 17, and 18, 2001; December 4, 5, 6, and 7, 2001, and January 22, 23, and 24, 2002, in Toledo, Ohio, pursuant to an original charge filed in Case 8-CA-31818 on August 10, 2000, by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union), against Promedica Health Systems, Inc. (Promedica); this charge was amended by the Union on

October 17, 2000. On April 13, 2001, the Union filed an original charge against the Toledo Hospital and Toledo Children's Hospital, a Subsidiary of Promedica Health Systems, Inc. in Case 8-CA-32345; this charge was amended by the Union on July 27, 2001.

On November 15, 2000, the Acting Regional Director (ARD) for Region 8 of the National Labor Relations Board (the Board) issued a complaint against Promedica in Case 8-CA-31818. On August 30, 2001, the Acting Regional Director issued his order consolidating cases, amended consolidated complaint joining Cases 8-CA-31818 and 8-CA-32345, and setting a hearing date of October 1, 2001.

The consolidated complaint alleges that Promedica and Toledo (the Respondent or sometimes individually as Promedica and Toledo) violated in numerous instances Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[1] On or about September 13, 2002, the Respondent timely filed a responsive answer essentially denying the commission of any unfair labor practices and asserting affirmative defenses to the charges in question.[2]

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[1] On or about January 24, 2002, the General Counsel and counsel for the Respondent reached a settlement agreement with respect to par. 33 of the complaint which alleged an unlawful termination of alleged discriminatee, Heather Joseph. I approved the settlement conditioned upon Joseph's assent to the proposed settlement. The terms of the settlement are incorporated in a January 25, 2000 letter from the General Counsel to Joseph, who, on February 3, 2002, by letter assented to the terms of the proposal. Accordingly, based on the proposed settlement agreement and the alleged discriminatee's assent thereto, I have permitted the withdrawal of the charge. I have included the aforementioned letters from the General Counsel and Joseph in the record herein designating them as Court Exh. 1.

Also, the General Counsel withdrew par. 20 of the complaint. I have approved the withdrawal.

[2] The Respondent asserted 16 separate defenses. However, at the hearing, the Respondent withdrew its "fifth defense," that the persons named in

Pursuant to a Stipulated Election Agreement approved by the ARD on March 13, 2001, an election was conducted on April 4-6, 2001, among Toledo employees in employee groupings described as the technical unit and the support services unit. The Union lost the election in both races and on April 13, 2001, the Union filed numerous objections to conduct affecting the results of the election. The ARD determined that the gravamen of certain of the Union's objections were coextensive with and/or identical to certain of the allegations contained in the unfair labor practice complaints in Cases 8-CA-31818 and 8-CA-32345. Accordingly on September 5, 2001, he ordered that these objections- Objections 5, 10, and 23-be scheduled for a hearing consolidated with the aforementioned unfair labor practice cases; the ARD also ordered that the Union's catchall objection, a part which asserted incidents that occurred outside the critical period of the election petition, be consolidated with the unfair labor practice proceedings.[3]

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs[4] filed by the

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pars. 31(a), 32(a), 37(a), and 38(a) of the complaint were not statutory supervisors and therefore not subject to the protections of the Act. With respect to the remaining defenses, they will be dealt with as appropriate in this decision. Any defenses not asserted in the Respondent's brief will be considered abandoned by them.

[3] During the course of the administrative investigation of the claimed objectionable conduct, the Union requested that 20 of the 26 objections be withdrawn. The ARD approved this request.

[4] On April 8, 2002, the counsel for the Respondent filed his motion to strike parts of the General Counsel's brief. The Respondent's counsel contends that the General Counsel's stated version of the issues presented

General Counsel, the Charging Party, and the Respondent, I make the following

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in pars. 27 and 28 of the complaint represents a fundamental posthearing modification of the allegations in question resulting in unfair prejudice to the Respondent's defense. The General Counsel opposes the motion, asserting that any variances between the complaint allegations and the adduced proof did not deprive the Respondent of any opportunity to fully and fairly litigate the issues presented by pars. 27 and 28. Further, he contends that the Respondent's failure to object at the trial or move for dismissal raises an implied consent to the litigation of the issues. I would deny the motion to strike. As noted by the Respondent's counsel, this trial was quite protracted, and the Respondent took full advantage of the time allowed by me to present its defense to these and other charges in the complaint. My decision herein reflects a full consideration of the Respondent's witness testi-mony and argument on the issues presented by pars. 27 and 28.

On April 16, 2002, the General Counsel filed his motion to strike a part of the Respondent's brief. The General Counsel specifically seeks to strike fn. 31 (p. 33) of the brief, which deals with alleged discriminatee Cynthia Miller who was discharged by the Respondent for wearing a sticker containing objectionable language. He asserts this footnote, about a matter not in issue in the instant litigation, was improperly included by the Respondent to attack Miller's credibility and character. The Respondent counters that the General Counsel several times raised the issue of Miller's termination to serve his point that his witnesses were anxious or fearful about testifying at the hearing because of the Respondent's actions against a union supporter; that this footnote in question was simply the Respondent's legitimate response to the General Counsel's tactic.

I will deny this motion in basic agreement with the Respondent. As I noted at the hearing, Miller's termination was not at issue in the trial. However, because the General Counsel raised the point in the context of the testimony offered by its other witnesses, the Respondent could probe the matter out of fairness. However, Miller's discharge was not a factor in my resolution of the complaint allegations that pertain to her.

Findings of Fact

I. JURISDICTION-THE BUSINESS OF RESPONDENTS PROMEDICA HEALTH SYSTEMS, THE TOLEDO HOSPITAL, AND TOLEDO CHILDREN'S HOSPITAL

The Respondents, Ohio corporations, with offices and places of business in the Toledo, Ohio area, have been engaged in the operation of not-for-profit acute health care facilities, including the Toledo Hospital, Flower Hospital, the Goerlich Center, and the Toledo Hospital and Toledo Children's Hospital. The Respondents annually, in conducting their business operations, derive gross revenues in excess of $250,000 and purchase goods and services valued in excess of $50,000 directly from points located outside the State of Ohio. The Respondents admit, and I find and conclude, that they are employers engaged in commerce within the meaning of Section (2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

It is admitted, and I find and conclude, that the Union, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The complaint, as amended, sets out numerous alleged violations of Section 8(a)(1) and (3) of the Act by the Respondent occurring over a period covering roughly May 2000 through about April 6, 2001, when the elections were concluded. As will be evident, the allegations in a number of instances are tied to the Respondent's conduct with respect to one employee. Accordingly, for clarity and brevity, I have organized my discussion of these charges by grouping all appropriate allegations under a heading specific to the employee in question. In the main, the allegations involving

individual employees took place in 2000 before the Union filed its election petitions, essentially in the summer of 2000.

Other charges alleged in the amended complaint can be fairly stated to have occurred in the context of the Union's preelection campaign and the Respondent's countercampaign, which covered the approximate timeframe of February through March 2001. The objections to the election as voted are coextensive generally with these charges.

Therefore, the discussion and resolution of the charges here will follow a chronology that includes the summer 2000 unfair labor practice allegations and the preelection unfair labor practice allegations.

However, before launching into the discussion of the actual unfair labor practice charges, I will first set out in preliminary fashion a background and overview of the litigation, the applicable legal principles, the contentions of the parties, and an observation or two on credibility issues which will figure heavily in the resolution of the many charges here.

B. Background and Overview of the Litigation[5]

The Respondent operates several hospitals and related facilities in northwest Ohio and southeast Michigan, which

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[5] As will be evident, this case contains many allegations and charges. In this background and overview section, I will discuss certain matters which hopefully will elucidate issues pertinent to this litigation and eliminate needless repetition and explication of terms, places, and other matters pertinent to the case.

Obviously, matters stated herein will have direct reference to the official record and/or reasonable inferences drawn therefrom. In the main, these references relate to undisputed or uncontroverted facts. The parties' briefs submitted in this case have been very helpful in this regard, and their efforts are much appreciated by me. However, it should be noted that in arriving at the facts undergirding the background analysis, I have credited testimony of the actual witnesses testifying on the subject in question.

offer a range of patient care services, including acute care, in-patient, long-term rehabilitative care, as well as prevention, wellness, and diagnostic treatment. The Respondent conducts its multi-patient care service operation on a tripartite regional basis, with the central region being the largest geographically, covering three counties in northwest Ohio. The central region is comprised of 70 separate entities, including the Toledo Hospital (Toledo) and Toledo Children's Hospital (TCH), the North Campus Laboratory (NCL), Flower Hospital (Flower), and the Goerlich Center (Goerlich), a 48-bed Alzheimer's nursing facility.[6] The central region is the region out of which the litigation emanates.

The Respondent employs about 7300 employees in the central region, 200 of which serve in managerial/supervisory capacities.

The central region is headed by Barbara Steele, whose responsibilities include day-to-day oversight of the Toledo Hospital/Toledo Children's Hospital as well as the development, execution, and implementation of hospital policies and procedure, including the determination of employee benefits. Employee benefits have to be ultimately approved by its board of trustees who receives recommendations from a 16-member group designated the executive council, which is chaired by Steele.

The Respondent has at least, since 1997, regularly used outside consultants in a number of areas, including hospital organization, finance, architecture, urban planning, nursing

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[6] Children's Hospital is in a way of speaking a hospital within a hospital; it is nonetheless a distinct entity within the Respondent's operations. These facilities are geographically and administratively separate. For instance, Flower is located about 10 miles from Toledo, and each facility has its own management structure and human resources department. For another, NCL is located about one-half mile from Toledo, and Goerlich is located on the campus of Flower.

education, and human resources. In the area of human resources, the Respondent has employed consultants to conduct employee and management surveys, benefits and wage assessments, and training in and understanding of various laws and statutes applicable to health care facilities.

In January 2000, the Respondent undertook a number of revisions in its management policies, including its solicitation and disciplinary policies, effective January 18, 2000.[7] The revisions were not in all cases major or substantial but were, as a general matter, to be applied throughout the central region.

The Respondent's solicitation/distribution policy as revised on January 18, 2000, was contained in policy 606 and applied to solicitation/distribution by nonemployees, as well as employees on hospital grounds and facilities. Regarding solicitation and distribution by employees, the policy provides in pertinent part as follows:

Purpose

The policy listed below applies to solicitation, distribution and loitering in all facilities of the organization and on its premises. The policy is designed to prevent disruption in facility operation, interference with patient care and inconvenience to patients and visitors.

Policy

SOLICITATION, DISTRIBUTION AND LOITERING BY EMPLOYEES:

1. Solicitation by employees for funds, membership or individual enlistment in outside organization or causes is

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[7] See R. Exh. 53, a power point presentation prepared by the Respondent's human resources manager, Patricia Appley, setting out various hospital policies which were not changed in any way. The Respondent used this document to educate management and supervisors on the revised policies over a period of time at various hospital policies.

prohibited at all times on work time and in immediate patient care areas. Solicitation is also prohibited if either the soliciting employee or the employee being solicited is on working time. Solicitation by employees shall be permitted during non-working time in all non-working areas of the facility that are not immediate patient care areas.

2. Distribution of literature and other materials by employees for any purpose is prohibited during working time and is also prohibited at all times in immediate patient care areas and other working areas of the facility. Distribution is if the employee distributing material or the employees receiving such material is on working time. Distribution by employees shall be permitted during non-working time in non-working areas and non-immediate patient care areas of the facility.

3. All employees are expected to enter the facility building in an appropriate amount of time to prepare to begin their shift and to leave the facility building as soon as practical upon completion of their shift. Except as otherwise provided in this paragraph, off-duty employees are not permitted to enter immediate patient care areas prior to the start of their shift and are to leave all immediate patient care areas of the facility upon completion of their shift. Off duty non-supervisory personnel are authorized to be in ProMedica facilities to visit patients, receive medical treatment, attended authorized Employer meetings, to visit the Human Resources office, to visit public areas of ProMedica facilities, or engage in otherwise approved activities by their supervisors.

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5. For purposes of this policy, the following terms are defined:

a. Working time is that time when employees are required to perform their assigned job duties.

b. Non-working time is that time established for meal periods, scheduled breaks, personal clean up time and time immediately before or after the assigned shift.

c. Non-working areas are those areas of the facility where employees are not regularly assigned work duties, including the employee break areas, cafeteria, main lobby, gift shop, restrooms, locker rooms, and corridors not in immediate patient care areas.

d. Immediate patient care areas are areas where patient care occurs including patient rooms, patient treatment areas, patient sitting rooms and elevators, stairways and corridors used to transport patients.

e. Working areas are all other areas of the facility.

All violations of this policy will be reported to the facility Director of Human Resources, or designee, and the Security department immediately.

It should be noted that the revision and contents of the Respondent's solicitation policy are not alleged or argued by the General Counsel to be violative of the Act.[8]

The Respondent employs a progressive disciplinary process that is incorporated in what it describes as its performance improvement management policy under policy 600, also revised in part on January 18, 2000. The specifics of the Respondent's performance improvement management system include employee recognitions, performance counseling (coaching), formal levels of discipline, and a time frame for presenting discipline and habitual offenders.[9] Policy 600 also contains a listing of inappropriate behavior that may be utilized by management as a guide to administering discipline in its facilities; the listing is

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[8] The General Counsel in his brief, however, suggests that solicitation was not a matter of concern for the Respondent until the advent of the Union in January 2000.

[9] See. R. Exh. 8. Policy 600 is set out completely in the document. The Respondent uses the terms, "coaching" and "counseling" interchangeably. Coaching is not included in the literal language of the policy.

described as not "all inclusive." Again, policy 600 is not alleged to be violative of the Act, either by dint of its having been revised or its contents, by the General Counsel.

In early January 2000, the Union commenced its organizing efforts at several of the Respondent's facilities, including Toledo and Flower Hospitals and the Goerlich Center. The union organizing campaigns continued through 2000.

On February 14, 2001, the Union filed four separate representation petitions for employees working in a proposed skilled maintenance unit (Case 8-RC-16173); a proposed nursing unit (Case 8-RC-16174); a proposed technical unit (Case 8-RC-16175), and a proposed support services unit (Case 8-RC-16176) on the main Toledo campus; no petitions were filed for employees working at Flower or Goerlich.

On about March 15, 2001, the Respondent and the Union entered into Stipulated Election Agreements which, inter alia, identified the four units appropriate for collective bargaining, established a challenge procedure for certain job classifications, and set election dates (April 4, 5, and 6, 2000), times, and locations.[10]

At some point, the Respondent decided to oppose the Union's organizing efforts. Toward that end, the Respondent retained and utilized human resource consultants to provide labor relations training to its managers and supervisors to oppose the Union during the preelection period. The Respondent, once in receipt of the election petitions, through its consultants and human resources department, undertook election-related training of its managers and supervisors, including the preparation of instructional materials for

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[10] See R. Exh. 54.

presentations in meetings to be arranged between management and the employees.[11]

During the campaign and preelection period, the Respondent established two employee teams and conducted at least 10 or more meetings with various employees at which these materials were presented by management and supervisors at various hospital locations.

On April 4, 5, and 6, 2001, the Board conducted secret-ballot elections; and the votes were tallied on April 7, 2001. The results of the election were as follows:

	Against Repre-sentation	For Repre-sentation	Challenged	Void
Skilled Maintenance Unit[12] (8-RC-16173)	44	20	9	2
Nursing Unit[11] (8-RC-16174)	790	318	52	0
Technical Unit (8-RC-16175	286	136	117	3
Support Services Unit (8-RC-16176)[13]	651	553	112	1

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[11] See. R. Exh. 5, an issues and answers overhead projection (slide) presentation; R. Exh. 52, an issues and answers script for the slide presentation; and R. Exh. 45, a handout dealing with a collective-bargaining agreement between the Union and St. Vincent Hospital.

[12] As noted herein, these units are not the subject of the objections in issue. The results of these elections have been certified. GC Exh. 2.

[13] With respect to the support services unit, subsequent to the election, the Union and the Respondent reached agreement with respect to 17 of the challenged ballots. The amended tally showed that of 1324 eligible voters, 1316 cast ballots; 553 were for and 651 were against the Union.

The objections to election results pertain only to the technical and support services unit.

C. Applicable Legal Principles

1. Legal analysis of the 8(a)(3) violations

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization. 29 U.S.C. § 158(a)(3).

Preliminary to determining whether an employer has discriminated against an employee in violation of Section 8(a)(3) of the Act, the Board has held that the General Counsel must first make a prima facie showing sufficient to support the inference that the protected activity or activities of the employee was a motivating factor in the employer's decision to discipline or discharge the employee. If this is established, the burden then shifts to the employer to demonstrate that discipline or discharge would have occurred irrespective of whether the employee was engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); *Briar Crest Nursing Home*, 333 NLRB 935 (2001). It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances provided. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the

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There are 97 challenged ballots, a number deemed insufficient to affect the outcome of the election. See GC Exh. 2.

record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge of that activity, animus, and adverse action against those involved, which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 349 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *Visador Co.*, 303 NLRB 1039, 1044 (1991); and *In-Terminal Service Corp.*, 309 NLRB 23 (1992).[14]

Once the General Counsel has made a prima facie case, the burden shifts back to the employer to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of protected activity. That burden requires a respondent "to establish its *Wright Line* defense only by a preponderance of evidence." The respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence

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[14] It is well established that in likewise, knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn. *Kajima Engineering & Construction*, 331 NLRB 1604 (2000), and cases cited therein.

tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

Notably, the test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). The Board has held that "[A] finding of pretext necessarily means that the reasons advance by the employer either did not exist or were not, in fact relied upon, thereby leaving intact the inference of wrongful motive. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

For purposes of the instant litigation, it should be noted that the Board has held that an employer violates Section 8(a) and (3) of the Act by issuing disciplinary warnings for the first time to employees for violations of its no-solicitation rule in the context of a union organizing campaign and in a manner disparate from past practices. *Clinton Electronics Corp.*, 332 NLRB 479 (2000); *6 West Limited Corp.*, 330 NLRB 527, 546 (2000).

Additionally, where the employer has been lax in the enforcement of its no-solicitation/no-distribution rule, the Board has held that the employer cannot validly enforce those rules against employees engaged in union solicitations or distributions, and violates the Act in so doing. *Meijer, Inc.*, 318 NLRB 50, 57 (1995).

2. Legal analysis of the 8(a)(1) violations

Section 7 of the Act (in pertinent part) provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." U.S.C. § 157. Thus, employees have the right to, inter alia, support or oppose union representation and to participate or refrain from participating in an NLRB election campaign.

Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct, which it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959). Thus, it is violative of the Act for the employer or its supervisors to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995). The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). *Rossmore House*, 269 NLRB 117 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has noted in this regard that the context of statements can supply meaning to the otherwise ambiguous or misleading expressions if considered in isolation. *Debbie Reynolds Hotel*, 332 NLRB 466 (2000).

In the interest of maintaining production and workplace discipline, employers can lawfully impose restrictions on workplace communications among employees and, in fact, when justified by such factors or considerations, employers can prohibit all talking while employees are working. *Stone & Webster Engineering Corp.*, 220 NLRB 905 (1975); *Pilot Freight Carriers, Inc.*, 265 NLRB 129, 133 (1982).

However, a no-solicitation rule is unlawful if it unduly restricts the organizational activities of employees during periods and in places where these activities do not interfere

with the employer's operations. *Our Way, Inc.*, 268 NLRB 394 (1983); *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994), cited in *Adtranz, ABB Daimler-Benz*, 331 NLRB 291 (2000).

Therefore, a prohibition on communication among employees cannot be overly broad, so broad that it prohibits communication among employees during paid nonwork periods such as breaks and lunch breaks or during the unpaid nonwork periods such as before or after work, so long as the employees are lawfully on the employer's premises. Such broad prohibitions are presumptively invalid. *St. John's Hospital*, 222 NLRB 1150 (1976). Said another way, employers may lawfully ban work-time solicitations when defined as not to include before or after regular working hours, lunch breaks, and rest periods. *Sunland Construction Co.*, 309 NLRB 1224, 1238 (1992), and they may remind employees of existing rules or established policies regarding solicitation. *Bryant & Stratton Business Institute v. NLRB*, 140 F.3d 169 (2d Cir. 1998).

Significantly, the Board has found employers liable for 8(a)(1) violations where employees are forbidden to discuss unionization but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activities in an organizational campaign. *Orval Kent Foods*, 278 NLRB 402, 407 (1986), cited in *Williamette Industries*, 306 NLRB 1010, 1011 (1992).

Employers who maintain and enforce a policy prohibiting off-duty employees from distributing union literature in nonworking areas of the employer's property without legitimate business justification may violate Section 8(a)(1). *St. Luke's Hospital*, 300 NLRB 836 (1990), *Orange Memorial Hospital*, 285 NLRB 1099 (1987).

In *Our Way, Inc.*, supra, the Board returned to the principal that in cases involving the legality of rules involving solicitations at work, the term "working time" is presumptively valid because it indicates with sufficient

clarity that employees may solicit on their own time, while the term "working hours" is presumptively invalid because it connotes periods from the beginning to the end of work shifts, which includes the employees' own time.

The Board has long held that an employer may lawfully prohibit employees from distributing literature in work areas in order to prevent hazards to production that would be created by littering the premises. *Stoddard-Quirk Mfg*, 138 NLRB 615 (1962); but this rule does not apply to a mixed use area. *Transcon Lines*, 235 NLRB 1163, 1165 (1978), affd. in pertinent part 599 F.2d 719 (5th Cir. 1979), cited in *United Parcel Service*, 331 NLRB 338 (2000) (Board upholds judge's finding that an employer unlawfully prohibited, distribution of union-related materials in a nonwork (or mixed use) area of premises between 7:30 a.m. and drivers' official start time of 8:40 a.m.).

Regarding employer interrogations of employees, it is well established that interrogation of employees is not per se illegal. The Board has held that the test of the illegality of interrogation is whether, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their rights. *Rossmore House*, 269 NLRB 1176 (1984). Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employees is an open and active union supporter, the background of the interrogation, nature of information sought, and the identity of the questioner. *Demco New York Co.*, 337 NLRB 850 (2002).

Other factors to be considered about questioning of an employee include time, place, and personnel involved. *Blue Flash Express, Inc.*, 109 NLRB 591 (1954); *American Freightways Co.*, 124 NLRB 146, 147 (1959); and *NLRB v. Illinois Tools Works*, 153 F.2d 811 (7th Cir. 1946).

Thus, the employer must inform the employee of the purpose of the questioning, assure him that no reprisals will take place, and obtain his participation on a voluntary basis;

the questioning must occur in a context free of employer hostility to union organization and must not be itself coercive in nature; questions must not exceed the necessity of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege. *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enf. denied on other grounds 334 F.2d 617 (8th Cir. 1965), cited in *A.S.I., Inc.*, 333 NLRB 70 (2001).

Notably, also, the Board has considered even arguably brief, casual, and not followed up questioning violative of the Act if the words and context contain elements of coercion and interference. *Sea Breeze Health Care Center,* 331 NLRB 1131 (2000). In *Sea Breeze Health Care Center*, the Board underscored its decision by citing the observation of the Fifth Circuit in *NLRB V. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1342 fn. 7 (1980):

[A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer's knowledge or suspicions about those views and the possible reaction toward the employee that his views may stimulate in the employer. That the interrogation might be courteous and low keyed instead of boisterous, rude, and profane does not alter the case. [Quoting from the underlying decision in *Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 172 (1979.]

The Board has long held that employer threats of (and presumably actual) close supervision because of union activity violates Section 8(a)(1). *Wellstream Corp.*, 313 NLRB 698, 704 (1994); *Paul Mueller Co.*, 332 NLRB 312 (2000); *Jennie-O Foods*, 301 NLRB 305, 310 (1991); and *Olympic Limousine Service*, 278 NLRB 932, 936 (1986).

Employers who unreasonably observe or take note of employees' union organizing or other activities may violate Section 8(a)(1) of the Act by creating an impression of surveillance. The Board test for determining whether an employer has created an impression of surveillance is whether the employer would reasonably assume from an employer statement (or conduct) in question that her union activities had been placed under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). As the Board stated in *Flexsteel Industries*, 311 NLRB 257 (1993), the idea behind finding "an impression of surveillance" as a violation of Section 8(a)(1) is that employees should be free to participate in union organizing campaigns without the fear that members of management are "peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." Said another way, the issue is whether the employer's behavior would reasonably suggest to the employee that there was close monitoring of the degree and extent of his organizational efforts and activities.[15]

Finally, Section 8(c) provides that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act,

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[15] See, for example, *Desert Pines Golf Club*, 334 NLRB 265 (2001), where the employer told a worker that it had received word that he was involved in union activity and that employees complained of being harassed about the union, held to be a violation; and *Avondale Industries*, 329 NLRB 1064, 1265 (1999), where employer pulled an employee aside and told him his prounion activities were known but refused to tell the inquiring employee the source of the information, held to be a violation of the Act. But see *Kathleen's Bakeshop, LLC*, 337 NLRB 1081 (2002), where employee's union involvement and activities were so open and well known that employer's statement deemed not sufficient to create impression of surveillance.

if such expression contains no threat of reprisal or force or promise of benefit. [29 U.S.C. § 158(c).]

The Board has noted that Congress added Section 8(c) to the Act in 1947 as part of the Taft-Hartley Act, because it believed that the Board has made it "excessively difficult for employers to engage in any form or noncoercive communications with employees regarding the merits of unionization."[16]

The Board has long held that an employer's promise granting withholding or rescission of benefits to employees in the context of union organizing or other protected activities may be violative of the Act. *Charles S. Wilson Memorial Hospital*, 331 1529 (2000). The Board recently in *Star, Inc.*, 337 NLRB 962 (2002), stated that "it will infer that an announcement or grant of benefits during the critical period [of the election] is coercive, but the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or bestowal of the benefit [citation omitted]."

It is equally and generally well established that in deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture. *Kauai Coconut Beach Resort*, 317 NLRB 996 (1995). To be sure, an employer may not inform employees that it is withholding wage increases or accrued benefits because of union activities. Conversely, however, an employer may tell employees that expected benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference. Id. at 997.

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[16] *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1361 (D.C. Cir. 1997). The Board has held that while Sec. 8(c) is not by its terms applicable to representation cases, the "strictures of the [F]irst [A]mendment, to be sure, must be considered in all cases." *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 fn. 11 (1962).

Thus, an employer who decides to postpone or put on hold the granting of wage increases (or other benefits) that it would have otherwise granted to its workers in a unit for which an election petition has been filed, must, to avoid a violation of the Act, advise the employees that the postponement was taken only to avoid interference with the election. *Earthgrains Co.*, 336 NLRB 1119 (2001). In *Atlantic Forest Products*, 282 NLRB 855, 858 (1987), the Board held that in such circumstances, the employer must assure affected employees that the benefits will be granted regardless of the election results; the sole purpose of the postponement is to avoid the appearance of influencing the election outcome; and the onus for the postponement is not placed upon the union.

D. Contentions of the Parties Regarding the Summer 2000 Unfair Labor Practices Charges

The General Counsel contends that when the Union began its organizing efforts in early 2000 and later intensified the campaign, the Respondent's reaction was essentially negative. Part of the Respondent's initial resistance to the Union included the disparate and selective enforcement of the hospital's solicitation/distribution policy against employees known to be union supporters. The General Counsel also submits that the solicitation/distribution policy 606, before the advent of the organizing campaign, had not generally been enforced, that various forms of solicitation activity was not only widespread but also took place at all hours of the day and in locations the hospital considered patient care areas. However, when the union organizing began in earnest, the hospital thereupon began a serious enforcement of its no-solicitation policy with a view, he submits, to interfering with the protected activities of the union supporters and discriminatorily disciplining them for engaging in such activities.

The Respondent counters, arguing that its solicitation/distribution policy, from its inception and

through its updating in January 2000, has always been enforced consistently and uniformly by hospital managers and supervisors. The Respondent points to the testimony of various supervisors at the hearing, but most pointedly to that of Patricia Appley, the Respondent's current director of human resources at Toledo, and Sandra Fiock, manager of human resources at Flower. The Respondent submits that Appley and Fiock credibly testified about the history of policy 606 updating and the hospital's approach to its enforcement, citing various examples thereof. The Respondent argues that the General Counsel's five witnesses called to refute the hospital's picture of consistent enforcement were not able to name a single supervisor who observed the supposed various and numerous nonunion-related solicitations that they said took place on an ongoing or commonplace basis.

The Respondent argues, in sum, that the General Counsel failed to demonstrate sufficiently that it violated the Act by disparately and/or selectively enforcing its solicitation and distribution policy.

Regarding the complaint allegations charging the Respondent with discriminatory discipline of the alleged discriminatees, the Respondent argues preliminarily that these charges should be dismissed because the counselings or "coachings" received by the affected employees were not formal disciplines and did not affect any employees' terms and conditions of employment. The Respondent, at some length, in essence, submits that its performance improvement management structure-policy 600-includes counseling as the preferred method of assisting employees in areas of job expectations or attendance because it provides the employee with an opportunity to meet the Respondent's performance standards before an issue escalates to the point that true discipline may be required. The Respondent concedes that coachings, which may be formal or informal, are documented with the Respondent's encouragement by managers and supervisors, but that this serves merely as a

tool for them to keep track of often many employees under their supervision. The Respondent also notes that coachings that may include positive remarks-recognitions-are documented on the same communication log or in a memorandum kept in the employee's departmental file. The Respondent concedes that "formal" coachings often cover conversations between management and employees to reinforce particular topics previously brought to the employee's attention, and these are documented on a performance improvement corrective action filed in the employee's departmental file. The Respondent, nonetheless, argues that this, too, is merely a sound human resources practice, a memory tool, carrying no negative connotation or implication for the employee's job or status with the hospital.

The Respondent contrasts its formal discipline under policy 600 by arguing that its formal discipline-verbal reminders, written reminders, decision-making leave (suspension), and termination-have job related consequences for the affected employees, such as not being considered for transfers or being subject to reductions in force or scheduled reorganization (downsizing), which matters are factored in the employee's rating or score; also, points are deducted from her score if the employee is currently on active discipline. The Respondent submits and insists that coachings do not affect an employee's score.

The Respondent also points out that formal discipline is progressive, meaning that any subsequent infraction of company policy will move the employee along to the next more serious level of discipline. Coachings, the Respondent asserts, does not have this feature.

The Respondent asserts that formal discipline includes an appeal or grievance component that allows the affected employee to challenge the recommended discipline. However, coachings are not subject to the grievance process. Finally, the Respondent contends that formal disciplinary

actions are active for a defined period, while coaching conversations are not considered for any period of time.[17]

E. Contentions of the Parties Regarding the Unfair Labor Practices Charges Prior to the Election

The General Counsel contends that the Respondent's (basically undisputed) announcement of a pay increase, and its later announcement (also undisputed) withholding of the pay increase for the PTs after the filing of the election petitions and during the critical period, constitute a violation of the Act. The General Counsel further contends that the Respondent also interfered with employees' Section 7 rights by making a number of threats to the employees, including threats to withhold or delay or a loss of an announced 401(k) pension plan; to implement more restrictive leave policies; to fire striking employees, and to eliminate flexible time off benefits and cross-training opportunities. Finally, the General Counsel asserts various other violations of the Act by the Respondent mainly by creating an impression that it was surveilling employees' union activities, suggesting (threatening) to them that different rules and regulations will be established and poor workers would be protected if the Union were elected; interrogating employees about their union activities; and coercively suggesting to an employee to quit his job because of her union sympathies. The General Counsel submits that these actions all took place after the filing of the election petitions and during the critical period of the election.

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[17] The Respondent's witness, Sandra Fiock, stated that verbal reminders are active for 6 months, written reminders for 1 year, and decision-making leave is active for 18 months. Fiock also stated that employee communication logs, which contain recognition and coaching conversations, are purged once per year. This, in my view, implies that at least for a year, an employee's coaching is "of record" in the Respondent's system.

The Charging Party Union joins the General Counsel, arguing further that these actions of the Respondent were simply a continuation of its "campaign of coercion" that began before the filing of the election petitions, and submits that this pattern of behavior was emblematic of the Respondent's disregard for the Act and the entire election process. The Charging Party argues that the Respondent should be found liable for the entirety of its misconduct and that the pertinent elections be set aside.

In general, the Respondent denied violating the Act during the preelection period, asserting that its behavior and that of its managers was above reproach and consistent with Board law. The Respondent submits that the General Counsel and the Charging Party Union have failed in their respective burdens of proof to establish either the commission of unfair labor practices or to set aside the elections results and order a new election. The Respondent's arguments will be discussed in greater detail over the subsequent discussion of the specific allegations.

F. Credibility Issues

As is surely obvious, the various witnesses called by the parties to this litigation related different and often highly contrasting versions of events and encounters between themselves. Thus, witness credibility, rather my determination of their credibility, will certainly be instrumental in resolving the charges herein. On the score, the General Counsel emphasizes this point, noting that the vast majority of his witnesses are current employees, all of whom were subpoenaed and in one or two cases, out of fear of retaliation, had to be ordered to testify by a Federal District Court Judge. He asserts, correctly, that Board law confers a mantle of credibility on current employees testifying about their employers because they are testifying

adversely to their pecuniary interests.[18] The Board's concerns of pecuniary risks are, in my view, not merely conjectural or theoretical.[19] However, it is important to note that I will not employ a mechanical approach to determining the credibility of the witnesses, all of whom were under an oath to tell the truth. Therefore, I have considered the testimony of all witnesses in terms of their demeanor, plausibility, corroboration, and, of course, employment status-to name but a few of the "elements" of credibility.

With the foregoing serving as a factual backdrop and a legal framework, we turn to a discussion of the individual unfair labor practices. My conclusions will follow each discussion.

G. The Complaint Allegations Involving Dea Lynn Keckler

In six paragraphs of the complaint, the Respondent is charged with violating Section 8(a)(1) and (3) with respect to employee and alleged discriminatee Dea Lynn Keckler.[20]

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[18] See *Flexsteel Industries*, 316 NLRB 745 (1995); also *Gold Standard Enterprises*, 236 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. in relevant part 308 F.2d 89 (5th Cir. 1962).

[19] See *Medic One, Inc.* (JD-143-99), October 26, 1999, where an employee supportive of the union testified credibly that his employer allowed him time to attend certification classes before the election but, after the successful union election, he was required to find a replacement to cover his assignment to attend these classes.

[20] Pars. 10, 11, 14, 32, 34, and 35. At the hearing, with respect to pars. 10, 11, and 32, the General Counsel moved to amend the allegations to correct typographical errors. He requested that June 4, 2000, be substituted for June 14, 2000, to conform with the proof. This was allowed by me.

Keckler testified at the hearing.[21] Keckler stated that she became involved in the Union's organizing campaign around March 2000 in response to an ad placed by the Union. Keckler said that she attended union meetings, passed out literature, handed out union authorization cards, and participated in obtaining card signatures. According to Keckler, she usually engaged in these activities in the hospital's garage[22] and occasionally in the cafeteria.

On about June 4, 2000, Keckler stated that her supervisor, Susan Somer, called her to her office for a meeting. According to Keckler, Somer said that she had received a complaint that Keckler was passing out union literature in the nurses' station on (Thursday) June 1. Keckler told Somer that she had not worked that day and when Somer suggested perhaps the day was Wednesday of the same week, Keckler also advised that she also had not worked that day. Somer then said perhaps it was Tuesday.

Keckler stated that she told Somer that, in fact, she had been very careful (about her solicitation activities) and that she did not usually pass out literature at the nurses' station.[23]

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[21] Keckler stated that she was employed as a registered nurse in the labor and delivery area of Toledo Hospital. Keckler has been working for Toledo since around March 1995 and once served as a supervisor in the labor and delivery area. Keckler stated that she is testifying under subpoena. Because of employee Cindy Miller's discharge by the Respondent during the pendency of this hearing, Keckler stated that she was concerned, nonetheless, about what she described as her job stability. In fact, Keckler resigned her position with the Respondent as of November 1, 2001.

[22] Keckler recalled that on May 24, 2000, she and alleged discriminatee Cindy Miller engaged in literature distribution in the garage. Miller's allegations are discussed elsewhere herein.

[23] Keckler said that she told Somer that she did not consider the nurses' station a direct patient care area since patients were not provided care or treatment there. However, Keckler stated that she did not and would not solicit at the nurses' station because it did not "look good."

According to Keckler, Somer then told her that union activities could only be conducted in the cafeteria and garage.

Keckler stated that nonunion solicitations generally occurred in the hospital and in the nurses' station; that items such as candy bars were sold; and various catalogs for Tupperware, Mary Kay, and Avon cosmetics, and party books are available in the nurses' station. According to Keckler, these items are openly sold in these areas[24] and the books and catalogs are simply lying about. Keckler related that the issue of solicitation was not raised until the union organizing commenced and employees, for the first time, were told then not to put any books (Tupperware and Avon) at the nurses' station desk. Keckler stated that after the June 4 meeting with Somer, she still continued her union activities, mainly obtaining card signatures and distributing literature but only in the garage area.

At the hearing, Keckler was shown a copy of a document, described as a positive performance employee communication log (communication log) concerning her conversation with Somer, but which she stated she had only seen when the General Counsel showed it to her.[25] Keckler stated that the "coaching document" is inaccurate in two

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[24] Keckler stated that she had been a former nursing supervisor and was aware of the hospital's formal (606) solicitation policy and that copies were in a manual kept in the department. According to Keckler, during her tenure as a supervisor, neither she nor other supervisors made any effort to apprise the employees of what the policy was. She conceded that new employees were given a handbook when hired but did not know whether employees received the policy. Keckler agreed that the nurses' station, according to the policy, is a work area where solicitation was prohibited.

[25] See GC Exh. 19. The document purports to memorialize a "coaching" that took place on June 6, 2000, of Keckler by Somer regarding the solicitation in question here.

aspects, the date of the coaching-June 6, 2000-is incorrect; and to the extent the language employed by Somer implies she agreed with Somer, the document is also inaccurate.

Keckler stated that she is familiar with "coachings" because of her past service with the Respondent as a nursing supervisor. She stated that coachings are a part of the Respondent's discipline system wherein employees may be disciplined verbally or in writing. If the offending behavior continues, the employee may be subject to a decision-making leave (a suspension) or even discharge. Thus, according to Keckler, a coaching can be cumulative in effect for purposes of the Respondent's disciplinary process. Keckler stated that in her view, all coaching is disciplinary in nature because coachings derive from an employee's doing something wrong or inappropriate and is being instructed to fix the problem.

Keckler stated that on about June 26, 2000, Somer called her at home and inquired about a patient incident report that Keckler, serving as an alternative charge nurse, had prepared on June 25, 2000.[26] Somer asked Keckler why she had prepared the report. Keckler explained her reasons and, in the end, she and Somer agreed that no followup on the incident was necessary and that the report would be simply filed for later reference if a problem or question arose.

According to Keckler, Somer then turned to a report she claimed to have received from an unidentified source who

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[26] Charge nurses, as compared to regular staff nurses, have additional duties such as serving as a technical resource for the staff nurses, ensuring that staffing levels are met, and assisting staff nurses in caring for patients. Charge nurses do not receive compensation for these additional duties.

Charge nurses have authority to call in nurses or permit them to go home early and can bring in other nurses from other units or release nurses to other units. However, charge nurses may not coach. The incident report she prepared on June 25 was prepared in her capacity as charge nurse. See GC Exh. 20.

said that Keckler was making threatening comments at the job. The so-called threatening comments stemmed from a complaint letter written by Elizabeth "Liz" Jackowski, clinical director of obstetrics, about Keckler's performance as a charge nurse.[27] According to Keckler, Somer said that she received a complaint that Keckler said when she (Keckler) found out who had written the letter, she (Keckler) was going to get her (them). Keckler admitted that she had had a conversation with another nurse who, upon finding out about the letter, said to her, "does this just piss you off, don't you want to know who wrote the letter?" Keckler said she responded to this person that she really did not want to know, it's not a real fun way to work. According to Keckler, Somer said she would not stand for retaliation in the department. Keckler said that she denied retaliating against anyone.

At the hearing, the General Counsel showed Keckler a communication log dated June 26, 2000, from Somer[28] in which their conversation about the incident was memorialized in a "coaching." Keckler stated that there were some inaccuracies; e.g., Keckler denied saying she would have strong feelings about the person who wrote the letter or would hold the letter against her.

Keckler stated that as of the mid-June 2000, she was being scheduled to serve as a fill-in charge nurse. Around June 21, 2000, she noticed that she evidently had been penciled in for charge nurse duties, but her name had been erased and

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[27] Keckler stated that on June 1, 2000, she had requested a meeting with the newly installed Somer to discuss department issues. Somer then informed her of a letter received by Somer's supervisor, Jackowski, among other things, accusing Keckler of taking excessive breaks, not helping other nurses, calling for nurses unnecessarily, and putting her work off on to others.

[28] See GC Exh. 21. Keckler here, too, stated she had not seen the log before the General Counsel showed it to her.

another nurse was substituted. Keckler stated that the last time she served as a charge nurse was around June 24 when she was the only nurse available that day-the regular charge nurse wanted to go home early and charge duty fell to Keckler.

Keckler stated that during the second week of July, she asked to meet with Jackowski about the complaints, which she did not feel were correct or justified, especially since she, just 3 weeks before, had received an "exceeds" (the highest) evaluation as she had for the past 2-3 years. According to Keckler, Jackowski told her that with respect to employee use of the Internet on the hospital computer, we should be flexible since there were a lot of single mothers (nurses) who need to buy items online and as long as they were not exceeding their breaktimes, this was okay.

Somer testified at the hearing and stated that she assumed the patient care supervisor position in the labor and delivery units on about May 1, 2000; this position had remained unfilled for the previous 2-3 months.[29]

Somer acknowledged meeting with Keckler on about June 1, 2000. According to Somer, Keckler had requested a meeting with her to discuss various and sundry issues related to the labor and delivery unit. Somer said that she met with Keckler and, after discussing certain unit matters with her, decided to bring up an April 4, 2000 complaint against Keckler by a registered nurse, on behalf of herself and several other night-shift registered nurses,[30] when Keckler

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[29] Somer had worked at Toledo since August 1978 and is an admitted supervisor within the meaning of the Act.

[30] Somer identified R. Exh. 43 as a copy of the complaint sent by nurse Zori Gillen to Somer's boss, Jackowski. According to Somer, this complaint was among the stack of correspondence she inherited upon assuming her position. Somer stated that she discussed the matter with Gillen prior to meeting with Keckler. Essentially, the complaints centered

served as an alternate charge nurse in the unit. Somer stated that she and Keckler discussed the complaint point by point. According to Somer, Keckler asked for no further clarification of the complaints. Somer stated that she memorialized this meeting, which she considered a counseling, in a communications log,[31] but there was no discipline imposed on Keckler. According to Somer, it was her hope that after this discussion, Keckler would be aware of what her peers thought of her, take corrective action, and the matter be concluded.

Somer also acknowledged that she counseled Keckler about distributing union materials. According to Somer, she received a complaint from a night-shift midwife, Donna Augustine,[32] that Keckler had distributed union material at the nurse station during her shift. Somer said that she verified the occurrence of the incident with several other employees[33] on duty at the time and on the evening of June 6 (in Somer's office) discussed the matter with Keckler.

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on Keckler's allegedly not being a team player when serving as charge nurse and taking excessive smoking breaks.

[31] This communication log is contained R. Exh. 6.

[32] Augustine testified at the hearing. Augustine stated she was employed by the Respondent as a supervisor, director of midwives, during 2000; she ceased her employment with Promedica on January 15, 2001. According to Augustine, she observed Keckler in the early summer of 2000 at about 11 p.m. at the nurses' station soliciting or distributing union material. Specifically, Augustine saw Keckler arrive at work with a bag of union buttons and offer a union card to an employee who signed the card and returned it to Keckler. Other nurses were present, one of whom told Keckler she should not be soliciting in the nurses' station. Augustine confirmed that she reported the incident to her superiors, Jackowski and Kleia Luckner, as Keckler was on duty at the time.

[33] Somer said she consulted with the charge nurse on duty that night, Sherry Moore, and also with several other unnamed employees.

According to Somer, she told Keckler that she had the right to distribute union materials but it was inappropriate to do so on duty time in patient care areas and that she was in violation of the policy if the report was accurate. Somer stated that Keckler agreed that the report was accurate and did not deny that she was soliciting at the nurses' station but Keckler said she did not view the nurses' station as a patient care area. Somer said she thereupon went over the hospital's solicitation and distribution policy with Keckler, advising her that the nurses' station was indeed a patient care area where no solicitation could take place on an employee's duty time, and that Keckler was in violation of the policy.

According to Somer, she did not tell Keckler where an employee could solicit and distribute, only where she could not. Accordingly, Somer stated that she did not mention the cafeteria on the parking lot as appropriate or permissible solicitation sites.[34]

Somer stated that on June 26, 2000, she was approached by two nurses, one visiting her office and one telephoning, but both beseeching her not to tell Keckler who had made the April complaints against her. According to Somer, the two nurses, Kathy Shannon and Carrie Lawrence,[35] both 15-year employees and each independent of the other, reported that

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[34] Somer claimed to be aware of the hospital's most recent formal solicitation policy by dint of her having previously served as coordinator of an outpatient clinic at Toledo, in which assignment she advised an employee not to sell Avon products at the nurses' station there. Somer admitted that she, nonetheless, has seen Tupperware and Longaberger (candles) brochures in patient care area. Somer said that she will either throw them away or return them to the employee whose name appears on the brochure and tell her she cannot solicit in the nurses' station.

[35] Kathy Shannon testified at the hearing; Carrie Lawrence did not. According to Somer, neither Shannon nor Lawrence had a role in the original complaint against Keckler. They both reported overhearing Keckler's comments at the nurses' station.

Keckler had openly stated in the nurses' station that she hoped she never found out who made the complaints because she would make their lives miserable.

Somer stated she took the threat seriously[36] and called Keckler in to get her side. According to Somer, Keckler did not deny, rather, she actually acknowledged that which she was accused of but explained what she meant. Essentially, Keckler said that she knew herself well enough; she could not forget anyone who had written a complaint about her, that she really hoped she never found out who it was. Somer stated that she told Keckler the complaining employees were fearful of and concerned about her comments; that her behavior was absolutely unprofessional; and that the hospital did not countenance behavior threatening to other employees.

In addition to writing the incident up, Somer stated she discussed the matter with her superiors, Jackowski and Kleia Luckner, clinical administrator, by way of followup and to determine an appropriate response. According to Somer, Jackowski, Luckner, and she decided that based on her attitude, Keckler did not possess the requisite professionalism for a charge nurse, was not a good role model for the position, and would not be assigned as charge nurse in the future.[37] Somer maintains that the June 26 entry

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[36] Somer noted that a charge nurse could, for example, change a staff nurse's assignment to a less desirable one or intentionally not assist a fellow nurse, which could indeed make a unit nurse's life (on the job) "miserable."

[37] Somer noted that management ultimately changed its policies and procedures for the charge nurses after the June 26 incident. Essentially, around September 2000, the hospital decided that a charge nurse should be a full-time nurse who would be available more days per week and could be more knowledgeable about policies and changes, and should have at least 2 years' experience in labor and delivery. Charge nurses would be selected based on their nursing skills and leadership qualities. Somer noted that under the new system, around 20 nurses were removed

on the communication log was not a discipline of Keckler but merely reflected a discussion with her and Somer's plans to follow up with Jackowski; that Keckler received no formal discipline as a result of the two nurses' complaints. Somer insisted that the counseling had nothing to do with any of Keckler's union activities; and, furthermore, Keckler's removal as charge nurse was also not related to her union support or activities.

Somer specifically denied telling Keckler that she was watching her or otherwise keeping track of her union activities, noting that Keckler worked nights and she worked the day shift. Somer felt that she in no way created an impression of surveilling Keckler's union activities.

Jackowski testified that as the clinical director for obstetrics services, she knows Keckler as a staff nurse in the labor and delivery unit and that Keckler off and on has visited with her in her office where they discussed any number of work and various nonwork-related topics. Jackowski stated that Keckler could have spoken with her in July 2000 because, in that year, Keckler visited frequently to discuss casually her job aspirations, including applying for another position at the hospital. Jackowski stated that she did not work directly with Keckler but knew she was regarded as a "safe" and good clinical nurse who gave appropriate care to her patients.

Jackowski stated that she could not recall any meeting with Keckler about Keckler's standing as a nurse or any complaints filed against her; nor could she recall a conversation with her about the hospital's policy on the use of its computers. Jackowski specifically denied having a conversation with Keckler regarding nurses' using the

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as charges nurse and that, in any case, Keckler would not have been eligible to serve as a charge nurse.

hospital's computers to purchase merchandise. Jackowski also denied Keckler's hearing testimony regarding a purported conversation between herself and Keckler regarding differences between employees taking smoking breaks and playing cards.

Jackowski maintained that the hospital's policy on distribution and solicitation requires that such activities not occur in clinical areas, and that computers are to be used for business only. According to Jackowski, she is responsible for 250 employees in her department and she attempts to enforce these policies and expects her managers to do likewise.

Kathy Shannon, a registered nurse employed at Toledo as a staff nurse in the labor and delivery for about 16 years,[38] testified that she worked with Keckler on the night shift during the summer of 2000. According to Shannon, Keckler complained to her on one night about a letter that had been written about her and that Somer had called her in to discuss it. Keckler stated that she did not know who had written the letter but that if she ever found out who wrote it, she would make her/their life miserable. Shannon stated that Keckler was very upset over the letter and that Keckler's facial expression at the time was frightening to her, so much so she was even afraid to testify at the hearing.[39] Shannon, however, noted that Keckler never threatened anyone specifically and never acted vindictively or retaliatory toward other employees as a result of the letter or otherwise. According to Shannon, she had made complaints against

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[38] Shannon also held the position of alternate or relief charge nurse for about 2 years.

[39] Shannon testified that she actually did not know what specific letter Keckler was upset about and could not recall if its contents were discussed in the summer conversation. Shannon said that she gathered from Keckler's angry reaction that it most likely related to her job performance.

Keckler to the supervisor for not doing the small things to assist the unit several years before this summer conversation but her complaints were not frequent. Shannon acknowledged that Keckler possessed good clinical skills. However, in her view, Keckler was not a good charge nurse because she did not have good interpersonal skills, was unprofessional, and therefore ineffective in that capacity.

Discussion and Conclusions of the Keckler Allegations

The Respondent, through Somer, is charged with creating an impression among its employees, here Keckler, that it was surveilling her union activities on June 4 and 26, 2000; unlawfully restricting Keckler's union solicitation and distribution activities by prohibiting her from engaging in such activities in nonworking areas on June 4, 2000; discriminatorily issuing a verbal disciplinary warning to Keckler on June 4, 2000; discriminatorily issuing and disciplinary coaching on June 26, 2000; and discriminatorily removing Keckler from her position as a fill-in charge nurse on June 26, 2000.

Regarding the surveillance charges, the Respondent asserts that, principally, Somer did not engage in anything that reasonably could be called surveillance of Keckler; that all Somer did was inform Keckler on the two dates in question that she had received complaints that Keckler had been observed distributing union materials at the nurses' station-a working area-where such activity was not allowed under the hospital's solicitation policy. The Respondent contends that an employer may lawfully require its employees to follow work rules and inform them of their noncompliance without failing within the ambit of prohibited surveillance.

I would find and conclude that under the totality of circumstances, the Respondent did not lawfully surveil or create the impression that it was surveilling Keckler for and because of her union activities. While the General Counsel argues that Somer was not credible, I do not share that view

In my view, both Keckler and Somer on the surveillance point were fairly consistent with each other. Irrespective of whether Keckler did or did not admit to distributing union literature at the nurses' station, which Keckler denied, and whether Somer failed to identify to Keckler the source of a possibly threatening statement made by Keckler, which she did, the point in my view is that Somer was clearly and reasonably acting on specific work-related issues as opposed to Keckler's union activities. I would, consistent with the authorities cited herein, find that Somer's remarks to Keckler on the dates in question could not be reasonably interpreted or considered as creating an impression of surveillance. I would recommend dismissal of these allegations.

Turning to the alleged unlawful restriction on Keckler's solicitation and distribution activities, the Respondent essentially contends that based on the complaint of another hospital employee to hospital managers that Keckler was distributing union materials and soliciting signatures at the nurses' station during the employees' shift, Somer confronted Keckler about the issue and, in the end, merely "coached" Keckler on policy 606's prohibitions against soliciting and distributing on worktime and in-patient care area.

Moreover, the Respondent submits that Somer was careful to advise Keckler that she had a right to solicit but not in the nurses' station on worktime. On balance, the Respondent contends that Somer consistently and evenly enforced the solicitation policy against Keckler after her investigation determined that Keckler had violated the policy.

Here, there seems to be no real issue in my view as to whether Keckler distributed on hospital property union materials on the day in question. Notably, there is no reason, in my view, to doubt Augustine's testimony on this point. I believe that she gave an accurate account of what she saw. The question is where Keckler solicited. Keckler stated that she did not believe the nurses' station was a work area but that soliciting there would not look good. This implies that

she was not being altogether honest about where she solicited on June 4. I believe and would conclude that she was soliciting in the nurses' station as Augustine testified and, furthermore, I would concur with the Respondent that based on the record herein (and cited authorities), the nurses' station is a work area (patient care area) in which soliciting and distribution could be prohibited under policy 606, the legitimacy of which is not at issue.

Therefore, Somer had a legitimate reason to prohibit Keckler's solicitation and distribution of the union materials in a working area. However, this does not meet the charge in question that goes to the disparate and selective enforcement of the policy against Keckler. I note that Keckler credibly, in my view, testified about the numerous open and varied nonunion solicitations and distribution of products at the nurses' station. As will be later clear, other employees testified (and provided proof) to this same general ongoing state of affairs in so-called working areas. While the Respondent in its brief denies and no workers, including Keckler, could identify supervisors or managers with direct knowledge of the breach, it seems clear that such nonwork solicitations and distributions were "common-place" and, according to some of the witnesses, continues today in the working areas, and that managers seemingly turned a blind eye to the solicitations and distributions. Therefore, Keckler's observation that policy 606 was seemingly not enforced until the union organizing commenced is, in my view, not far off the mark and consistent with the observations of other employee witnesses in this case. I would conclude that prior to the advent of the Union, the Respondent's enforcement of the solicitation policy, if not nonexistent, was extremely lax and that its subsequent enforcement against union supporters

like Keckler, who distributed in working areas, was discriminatory and in violation of the Act.[40]

Directing myself to the issue of Keckler's alleged disciplines, the Respondent strenuously throughout contends that its counseling's and coachings are not the discipline that triggers a violation of 8(a)(3)'s proscriptions.

I will be brief on this point. The Respondent attempted to draw a clear distinction between its coachings, whether formal or informal, and the formal discipline process. In that regard, I certainly agree that there are such distinctions that I have pointed out and acknowledged. However, as the General Counsel submits in his brief, the testimony of Fiock and Appley, the Respondent's human resources managers, clearly indicates that counselings/coachings can be and are used by the hospital for further and increased discipline up to and including termination. As will be seen in subsequent discussions of other "coached" alleged discriminatees, coachings, contrary to the assertion of the Respondent, can and do have an immediate effect on an employee's terms and conditions of employment. I would find and conclude that coachings or counseling in the Respondent's disciplinary scheme are of much consequence to an employee's terms and conditions of employment as to trigger the protections of Section 8(a)(3) of the Act.

Thus, we turn to the Keckler's verbal disciplinary coaching on June 4 for allegedly violating the distribution policy. The Respondent's main contention beyond the nondisciplinary nature of counseling is that Keckler violated

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[40] I note that as pointed out by the General Counsel, even the Respondent's witnesses could only point to limited instances of their policy 606 enforcement efforts. It seems clear to me that based on the regularity of the nonunion solicitations-e.g., the opening of school year, Christmas sales, and Girl Scout cookies-in late winter, much more in the way of enforcement of the policy was possible, but was not evidently undertaken.

the policy in question and that Somer never prohibited Keckler from soliciting in nonworking areas for the union cause. Essentially, the Respondent asserts that Keckler was rightfully disciplined for the infraction of the rule and not because of her union activities.[41]

As previously stated, the *Wright Line* analysis is invoked in cases where discriminatory action is alleged. Here, there is no dispute regarding the Respondent's knowledge of Keckler's support of and activities on behalf of the Union and, in fact, that her union activities and support were manifest and central to her being disciplined. I have previously concluded that the restrictions the Respondent placed on Keckler's distributing at the nurses' station were discriminatory in context and, as such, supplies the requisite animus under the tests. I would find and conclude that the Respondent's coaching disciplining of Keckler on June 4, 2000, was based on its discriminatory enforcement of its solicitation policy and that the Respondent has not met its burden under *Wright Line* to establish its defense by the preponderance standard.[42]

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[41] I have carefully considered the Respondent's rather lengthy explication of the distinctions and nuances of counseling as compared with its so-called formal disciplinary process. I believe that counseling is simply not as benign and inconsequential as the Respondent urges. The record on the whole justifies my conclusion. I have also considered with equal attention the principal case relied on by the Respondent. *Lancaster Fairfield Community Hospital*, 311 NLRB 401 (1993), and consider the case distinguishable from more appropriate authority; namely *Trover Clinic*, 280 NLRB 6 (1986); and *Whirlpool Corp.*, JD-99-00 (2000).

[42] I would note that while the Respondent took action against Keckler on June 4 for distributing union materials, it undertook no investigation of the other employees mentioned by Augustine who received Keckler's materials or who signed authorization cards. Presumably, these employees were on duty and also participating in a prohibited solicitation. Yet, the only worker counseled was Keckler. Clearly, counseling, if the Respondent's argument holds true, should have been

Turning to Keckler's June 26, 2000 coaching and her subsequent removal from the position of charge nurse at about the same time. I would find and conclude on the strength of my previous findings that the General Counsel has met his initial burden per *Wright Line*. The remaining issue is whether the Respondent's defense to these charges is sufficient. I believe that it is. In this regard, I have credited Somer's testimony regarding her handling of these matters. Essentially, the Respondent argues that irrespective of Keckler's good evaluations and reputation as a "safe" nurse, Somer undoubtedly received complaints from unit nurses about Keckler as early as June 1 and counseled her heads-up fashion about the problem. In spite of this, Somer, around June 26, received complaints from two nurses indicating that Keckler had not reacted very well to the criticism and made comments threatening to other nurses. Thus, Somer, on June 26, called Keckler to discuss the matter and ultimately counseled her on inappropriate and unprofessional behavior. Later, Somer and her superiors consulted, decided that Keckler was not suitable to serve as a charge nurse, and she was removed from that assignment.

Based on the record herein, it is clear to me that the complaints Somer received about Keckler were substantial and serious and could affect the operation of the unit; and she took reasonable action to deal with them. I note that none of the complaints involved Keckler's union activities-all were based on other nurses' views of Keckler's personal on-the-job behavior and attitude when she served as charge nurse. Contrary to the General Counsel, I do not find it significant that Shannon, one of the complainants, may have not liked

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given to all involved with Keckler. This failure to investigate is also emblematic of the discrimination against Keckler and strongly influences my conclusion that Keckler was discriminated against because of her union support and activities.

Keckler-a view I do not share, I might add. The question is whether Somer's actions were bona fide and not taken for unlawful purpose. I do not deem it appropriate to second guess a manager's decision unless that decision is suspect. Here, I believe that irrespective of Keckler's union support and activities, and my prior finding of discrimination against her, that the Respondent would have, under the circumstances, counseled her about the threats she reportedly made and removed her from the charge nurse position. I would recommend dismissal of these charges.

H. The Allegations Involving Robert Hasenfratz

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act with regard to an employee and alleged discriminatee, Robert Hasenfratz.[43]

Hasenfratz, a registered nurse employed at Flower Hospital since 1997, works in the psychiatric services unit in the acute care unit; his immediate supervisor is Barbara Staccone.

Hasenfratz testified that he became aware of the Union's organizing campaign in April 2000 and subsequently engaged in various organizing efforts on the Union's behalf, i.e., passing out union authorization cards, obtaining signatures, and attending union meetings. Hasenfratz stated he spoke to employees at both Flower and Toledo Hospitals about the benefits of a union contract and, in general, union representation; Hasenfratz stated that he also handed out union literature on hospital premises, but only in nonpatient areas.

Hasenfratz was interviewed by a reporter from The Toledo Blade on about May 11, 2000, and, in a May 12

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[43] See pars. 9, 31, and 39 of the complaint.

newspaper article,[44] he was (paraphrased) quoted as having made comments favorable to and supportive of the Union. Five days later, around May 17 or 18, Hasenfratz was called to a meeting with Staccone at the end of his shift.

According to Hasenfratz, Staccone and he were alone and she stated that someone had complained about his soliciting "something" about the Union. Hasenfratz stated he asked Staccone who made the complaint. Staccone could or would not disclose the person, explaining that she was not comfortable in disclosing the identity of the person.

According to Hasenfratz, Staccone also told him that he had been involved in soliciting "something" about the Union that had caused a decrease in productivity and patient care, which, in turn, had brought about decreased patient satisfaction. Hasenfratz said he told Staccone that he indeed was active in soliciting for the Union but had confined his activities to the hospital cafeteria and employee breakroom; in any case, he did not solicit in any immediate patient areas. Staccone thereupon gave him a copy of the official hospital solicitation policy-policy 606-and instructed him to conduct his union activities in the hospital cafeteria.[45] Hasenfratz stated that he broached The Toledo Blade article and he told Staccone he felt she was retaliating against him because of his comments to the reporter. According to Hasenfratz, Staccone said the meeting had nothing to do with the article

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[44] This is the same article in which employee and alleged discriminatee Billie Smith was quoted. (See. GC Exh. 10.) Hasenfratz is quoted as follows: "[H]e hopes a union would bring more consistent benefits and reduce favoritism. He questioned whether raises for many Flower RNs this year were an effort to thwart unionization."

[45] Hasenfratz claimed that he had never seen the written policy before this meeting.

and issued him a formal coaching, which he signed under protest.[46]

Hasenfratz stated that he understood a formal coaching to be the first step in the disciplinary-process and could be cumulative in terms of additional discipline. Regarding employee solicitations at the hospital, Hasenfratz stated he has observed employees engaged in a number of sales, solicitations, and fundraising efforts for Avon cosmetic products and candles. He also claimed to have seen books and order forms for Boy Scout popcorn and Girl Scout cookies, as well as church solicitations at the psychiatric nurses' station and in the day areas where patients and visitors spend their times.[47] According to Hasenfratz, as late as October 2001, an employee tried to sell him candy for her son's school during worktime. Hasenfratz also said that even supervisors participated in the solicitations and purchase of items. However, Hasenfratz was not aware of any supervisors being in the areas when he saw the solicitations he described. Hasenfratz stated he only became aware of the

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[46] See GC Exh. 11 (identical to R. Exh. 9), dated May 17, 2000. Hasenfratz' formal coaching is set out on a performance improvement management corrective action form and describes the consequences of his failure to improve his behavior, soliciting others during worktime, as "up to and include, termination." The coaching does not identify the person complaining against him, stating, "It was brought to management's attention [that he was in violation of Policy #606]."

[47] Hasenfratz identified a Party Light candle postcard he said he found at the nurses' station during August 2000 addressed to a social worker employed at Flower from former unit director Jean Smith who left the hospital 3 to 5 months before the union campaign began. See GC Exh. 12. He also stated that his supervisor, Staccone, had purchased photographs being sold by a named employee in August 1999. Hasenfratz stated that the solicitations of the Boy and Girl Scouts, Avon, and other activities and causes he identified took place prior to, during, and after the union campaign.

hospital's official solicitation policy on the day he was coached.

Hasenfratz related a meeting he had with Staccone, which again resulted in his being given another formal coaching. Hasenfratz stated that on August 24, 2000, he met with Staccone, Cathy Middleton, the clinical director, and a fellow worker he asked to sit in on the meeting, Ray Havens. According to Hasenfratz, Staccone, reading from a prepared document, claimed an employee had lodged a complaint charging him with intimidating and harassing behavior. Staccone's reading of the complaint informed him that he had a right to organize, but that other employees have a right not to participate and not be harassed and bothered.[48]

Hasenfratz stated that he denied the charge and told Staccone that when he approaches a person unwilling to sign an authorization card, he leaves them alone; he felt there was no legitimate reason for anyone to complain about his behavior. Hasenfratz stated he also was never given the name of the person who complained against him or the particulars of his complaint other than the general description in the coaching document.

Hasenfratz said that Middleton told him she respected the right of her employees in the intensive care unit to organize and suggested that solicitation should take place in the hospital cafeteria and public areas. Hasenfratz stated he told Middleton that he had solicited in the cafeteria in July (2000) but was told by a security guard that Sandy Fiock, human resources director, said that he could not solicit in the cafeteria and should use the employee entrance to the

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[48] Hasenfratz' formal coaching is contained in GC Exh. 13 (identical to R. Exh. 10) and includes the charge by an unidentified employee. The coaching document advised Hasenfratz that continued behavior of the type charged would result in his being placed in corrective discipline. Hasenfratz signed the form under protest.

hospital. Hasenfratz said that he followed this directive and when he solicited at the employee entrance, another security guard told him to go back to the cafeteria, which he dutifully did. Hasenfratz said he told Middleton this type of thing happened to him routinely when he passed out leaflets and talked to employees about the union drive and asked them to sign cards. Hasenfratz said he told Middleton and Staccone that he believed that he was again being retaliated against because of the newspaper article and, in fact, they were fabricating incidents and writing false (disciplinary) documents. According to Hasenfratz, Middleton suggested that he file a grievance. Hasenfratz told her that he was going to file a charge with the Board. Hasenfratz stated that aside from the formal coachings themselves, he has not suffered any adverse consequences on the job since August 24, 2000; for instance, he has received all raises due him. However, Hasenfratz says that he felt threatened (in his job) because the coachings are cumulative and can be used against him in the future.

The Respondent called Staccone, Robert Czyzewski, Don Griffin, and Sandra Fiock to rebut Hasenfratz.

Barbara Staccone[49] testified at the hearing and acknowledged that she coached Hasenfratz but that the coachings occurred on May 17 and August 23, 2000.[50]

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[49] Staccone has served as the clinical director for psychiatric services located on the third and seventh floors at Flower since November 1999. Approximately 110 employees (including registered nurses, mental health professionals, social workers, activity therapists, and unit clerks) report to her. Staccone is an admitted supervisor within the meaning of the Act.

[50] Staccone identified a communication log indicating her having coached Hasenfratz on May 17 and August 23, 2000. Notably, by mistake, this exhibit appears as the Charging Party's exhibit and is unnumbered. The transcript reflects this document as having been marked, identified, and admitted as R. Exh. 13.

According to Staccone, Hasenfratz was coached on May 17 because Sandra Fiock, the human resources manager at Flower, told her that an employee, Lynette Maze,[51] had told Fiock that Hasenfratz was soliciting employees to organize in the patient care area of the psychiatric unit during worktime. Staccone admitted that she did not witness Hasenfratz' purported activities on the unit and that Hasenfratz not only denied soliciting on worktime but stated his belief that he was being retaliated against. Staccone stated that while Fiock suggested that Hasenfratz receive a formal coaching, Staccone ultimately decided to issue the formal coaching, which Hasenfratz signed under protest. Staccone acknowledged that she had only one meeting with Hasenfratz regarding the May 17 incident and had actually prepared the formal coaching document prior to this meeting.

Staccone said that Fiock's report of Hasenfratz' activities indicated that he was obtaining a signature on a union card-she did not know from whom-when he should have been dealing with patient care issues and the patients themselves. Staccone admitted that she did not ask Hasenfratz during this meeting whether any patients were at the station at the time nor did she determine from him whether he was on break or on downtime. Staccone admitted that she never told him the source of the report.

Staccone stated that with respect to Hasenfratz' August coaching, Fiock informed her that an employee had come to human resources and filed a report of his having been harassed in the hospital parking lot. Although she received this information from no other source than Fiock, Staccone believed the report was valid and set up a meeting to which

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[51] Maze did not testify at the hearing. Hasenfratz claimed he did not know her. Staccone admitted that she did not consult with Maze (or Mays) about what she claimed to have observed.

Middleton,[52] as her witness, and another mental health employee, Havers, as Hasenfratz' witness were invited. Staccone said that she told Hasenfratz that he was free to organize on his own time (consistent with her coaching statement) but that the complaining employee felt he was being intimidated and harassed to organize. Staccone admitted that she did not know what Hasenfratz actually said to the employee to intimidate or arass him,[53] and she also recognized at the time that the incident occurred in the parking lot, where solicitation is allowed. Staccone again stated that Fiock suggested imposing a formal coaching treatment to Hasenfratz, but she ultimately decided on her own to impose a formal coaching as opposed to simply memorializing the discussion in the communication log.[54]

Staccone acknowledged that only very serious offenses justify a formal coaching. She cited the example of neglect of a patient and the employees' failure to correct the problem. In her view, informal coachings are employed when certain job expectations are not met; for example, messy or incomplete paperwork. Generally, in such cases, Staccone stated that she discusses the matter with the employee. According to Staccone, the circumstances dictated that Hasenfratz be formally coached, but not formally disciplined for the incident in question.

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[52] Staccone did not address any statements Middleton may have made.

[53] Notably, Staccone's August 23, 2000 entry indicates that Hasenfratz believed that the complaint was manufactured by management and that the charge merely reflected an intimidation and interrogation tactic. The report further corroborates Hasenfratz' statement that he would not pursue the hospital's grievance policy but would pursue other (undisclosed) channels.

[54] Staccone indicated that she uses the communication log as a reference tool to determine an appropriate course of action and, in the past, has always followed Flock's recommendation to coach an employee formally.

Staccone stated that she has coached other employees regarding the hospital's solicitation/distribution policy and had instructed them not to sell candy and cookies on the unit. Staccone claimed that she always enforced the policy when she is aware of infractions, even in case of employees engaging in conversations about their private lives at the nursing station when patients were present or nearby. Staccone also admitted having purchased, about 2 years ago, photographs from an employee but the transaction occurred off the worksite at a museum; however, the employee did drop the pictures off at her office as he was leaving work that day.

Staccone also stated that she formally coached that same employee for harassment of another employee in 1999. According to Staccone, she has never received a harassment complaint and not followed up on it.[55]

Staccone acknowledged that she was aware that Hasenfratz wore union buttons prior to the May 17 coaching and was wearing the buttons when he was coached in August.[56]

Sandy Flock testified that she was familiar with Hasenfratz and that he had received two formal coachings by Staccone and that copies of these were placed in his personnel file as well as in the department file. As human resources manager, she also has access to these documents.

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[55] Staccone said harassment includes racial or sexual remarks and other behavior covered by the management handbook. She did not know if union organizing was considered harassment. The other employee she coached for harassment was not engaged in union organizing.

[56] I questioned Staccone regarding her knowledge of Hasenfratz' union activities. Staccone was somewhat hesitant in her response, saying, "so I would assume, but I can't assume that he was ... doing the organizing or anything. (Tr. 930-931.)

Fiock stated that regarding the May 17 coaching incident, Lynette Maze, a part-time unit clerk in the psychiatric unit, advised her one morning that Hasenfratz was at the front of the nurses' station with another employee, and both on working time, discussing union-solicitation issues, including the benefits of a union. Fiock regarded the nurses' station as a patient care area since patients walk by the areas in front of the nursing station. Fiock reported the matter to Staccone, reminding her of the solicitation policy and requesting that Hasenfratz be given a formal coaching.[57] Fiock admitted she acted strictly on the word of the unit clerk and did not herself speak to Hasenfratz about the matter.

Fiock related that in July 2000, Robert Czyzewski, the hospital's security supervisor, advised her that Hasenfratz was distributing literature in the MRI hallway on the hospital's ground level and requested instructions. According to Fiock, she instructed Czyzewski to ask Hasenfratz to move to the cafeteria. Czyzewski reported to her that Hasenfratz refused to leave the hallway, whereupon Fiock said she went to that area but Hasenfratz had gone to the cafeteria. Fiock stated that although she regarded the MRI hallway as a patient care area because patients (along with family members) are transported back and forth to the area where diagnostic imaging and CAT scans are performed, she took no disciplinary action against Hasenfratz. Moreover, she did not even speak to him about the incident.

Regarding Hasenfratz' August 23 coaching, Fiock said that a supervisor from housekeeping was told that an

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[57] Fiock identified the other employee with whom Hasenfratz was reportedly soliciting as Ed Kucher with whom she never spoke about the matter. Fiock admitted that she did not ask Staccone to set up a meeting with Kucher about the incident. Fiock said that she was not aware of Kucher's having received a formal coaching. I would note at this juncture that Staccone did not discuss Kucher at all in her testimony. I assume she did not coach him at all regarding the incident.

employee, Don Griffin, was involved in an incident in the parking lot with another employee and that Griffin felt intimidated and harassed as a result. According to Fiock, the housekeeping supervisor asked Griffin to make a statement. Griffin filed a security/incident report and submitted it to Fiock's department. Fiock stated that the security report was kept in Hasenfratz' personnel file, but he was not given a copy. Fiock said that she asked Staccone to speak to Hasenfratz about the matter and, ultimately, a formal coaching was administered.[58] Fiock conceded that Hasenfratz' reported conduct was more directly related to the hospital's harassment and intimidation policies, as opposed to the solicitation and distribution policy. Fiock also acknowledged that the parking lot was a permissible place for employees to solicit or distribute materials.

Don Griffin, a 29-year porter in housekeeping at Flower, testified that he was arriving at work at about 4:10 p.m., whereupon an employee approached him to sign a union authorization card. Griffin told the man that he was not interested. However, the man persisted and asked him why he was not interested. Griffin said he told the man it was none of his business. However, the man continued to press the matter, saying that the Union could get him more money, better benefits, and no-cost insurance. Griffin said he understood that but still was not interested. Ultimately, Griffin said he told the man to get out of his face. According to Griffin, he was still in his car and the man was 2-4 inches

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[58] Fiock stated that she directed Staccone to give Hasenfratz a formal coaching based on the report of the supervisor of environmental services, June Wilkerson, who relayed to her the complaint of Griffin. Fiock stated that she did not speak with Wilkerson and only read Griffin's incident report before directing Staccone to coach Hasenfratz. Fiock admitted Griffin's incident report statement does not suggest that he was being threatened by the employee; rather, it seemed to convey that he was uncomfortable.

from the vehicle. Griffin said he felt uncomfortable, a little irritated, and angry. Griffin said that the man went away eventually and Griffin reported for work. Griffin said that he reported the incident to his supervisor, Wilkerson, telling her that he felt he had been harassed and later filed a written complaint about the incident.[59]

Griffin said he did not know Hasenfratz by name, but by face, and that Wilkerson told him that the person in question was the male nurse who worked on the seventh floor. With this information, Griffin said he was somewhat clued to Hasenfratz as the person who harassed him. Griffin could not recall from whom he had gotten Hasenfratz' name but never actually made a physical identification of him to management.

Griffin admitted that Hasenfratz, at no time in their encounter, made any physically threatening movements or remarks and that Hasenfratz, after making his last pitch for the Union, left the area.

Robert Czyzewski testified that he is the security supervisor at Flower and supervises about 14 security officers.

Czyzewski stated that the supervisor of housekeeping, Wilkerson,[60] reported to him that one of her housekeeping employees, Don Griffin, reported to her that he had been

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[59] Griffin identified R. Exh. 10 as a copy of the complaint he filed. Griffin stated he spoke to no one else in management, was never contacted about the incident by management, and, specifically, was never counseled for telling Hasenfratz to get out of his face.

[60] Wilkerson testified at the hearing and confirmed that Griffin reported the parking lot incident to her and that he, at the time, appeared very upset and was actually shaking. She advised him to report the incident. According to Wilkerson, Griffin knew the person, having seen him quite frequently around the hospital but did not know his name. She said that Hasenfratz was later identified by Czyzewski who evidently knew him.

harassed in the hospital's south parking lot. Czyzewski stated that as part of his usual procedure in such cases, he asked Wilkerson to have the employee submit an incident report so that he could commence his investigation. Griffin prepared a statement regarding the incident. Czyzewski said that he personally did not interview Griffin as part of his investigation.

Czyzewski stated he went to the south parking lot where he observed Hasenfratz at the time approaching an employee. Czyzewski said he asked Hasenfratz what had happened. According to Czyzewski, Hasenfratz said as far as he was concerned, nothing, that the incident never took place. Czyzewski said that in response to Hasenfratz' question about permissible solicitation areas, he told Hasenfratz that solicitation was only permitted in nonpatient areas-parking lots, cafeteria, and any other place where patients were not being treated. Czyzewski admitted that Hasenfratz was off duty at the time and was not violating the policy he had outlined to him.[61] Czyzewski stated that he had told Hasenfratz that he could solicit but not harass employees.

Czyzewski reported his handling of the matter to human resources but conducted no further investigation of the matter. Czyzewski stated he did not show Hasenfratz a copy of Griffin's statement.

Discussion and Conclusions of the Hasenfratz Allegations

The Respondent is charged with creating an impression of surveillance of its employees, here Hasenfratz, and imposing on him two disciplinary coachings because of his support for and activities on behalf of the Union on May 17 and August 24, 2000.

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[61] Czyzewski believed that Hasenfratz asked him where he could solicit, but, in the early stages of the organizing effort, it was not clear at the time (even to Czyzewski) the permissible solicitation areas.

Regarding the surveillance charge, the General Counsel essentially asserts that Staccone's statements to Hasenfratz at the May 17 counseling session that a person whose identity she admitted she did not disclose to him had complained about his soliciting for the Union at the unit's nursing station, constitutes a surveillance or the creation of the impression of surveillance of Hasenfratz' union activities. The Respondent essentially contends, however, that Fiock, in her capacity as human resources director, received a report from Maze[62] regarding Hasenfratz' activities and in the normal course contacted Hasenfratz' supervisor, Staccone, who then counseled him because his activities were violative of the solicitation policy. The Respondent submits that there was no surveillance or the creation of surveillance.

First, I note that, in my view, Hasenfratz testified credibly although he was clearly prounion and, on the witness stand, was somewhat combative in his demeanor and delivery. I attribute this to "heat of battle" reaction and not to any attempt to evade or show hostility so that his veracity was compromised.

In agreement with the General Counsel, I would note that the Respondent's counseling of Hasenfratz took place suspiciously, only a short time after his name and statements supportive of the Union appeared in the local newspaper; that the Respondent failed (refused) to disclose the name of the person accusing him of soliciting in violation of the policy; and that the Respondent undertook little or no investigation of the underlying report of violation of policy, that Hasenfratz could, under such circumstance, conclude reasonably that his union activities were under surveillance. I would find a violation of Section 8(a)(1).

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[62] Maze is no longer employed by the Respondent and did not testify at the hearing.

We now turn to the two counseling sessions, which I view as disciplinary in nature. First, it is clear that Hasenfratz, like Keckler, was counseled because he was thought to be soliciting on behalf of the Union at the psychiatric unit's nursing station.

Second, like Keckler, Hasenfratz also testified to fairly open and commonplace solicitations for and distributions of products by employees at the nurses' station prior to, during, and after (as late as October 2001) the election campaign, and he produced a candle light postcard as evidence of this. As I have previously determined, I cannot conceive of the Respondent's management not knowing about these solicitations; the evidence was ubiquitous. Therefore, I cannot credit the Respondent's denials of knowledge or its claims that it assiduously and diligently enforced the policy uniformly. This claim does not ring true considering the entire record, which in my view supports a finding that the Respondent was very lax in enforcing the policy and may have turned a blind eye to violations except in the case of union solicitations and distributions.

I would find and conclude, consistent with my analysis of the Keckler allegations, that the Respondent violated Section 8(a)(3) and (1) of the Act in counseling Hasenfratz on May 17.[63]

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[63] For purposes of *Wright Line*, I would note that it is clear that the Respondent knew of Hasenfratz' union activities and support. In my view, the Respondent's counseling was focused on his union activities and, consistent with its discriminatory enforcement of the 606 policy, animus against the Union is clearly demonstrated. I have rejected the Respondent's primary defense of the nondisciplinary nature of counseling as well as its defense that the managers consistently and uniformly enforced policy 606. Therefore, in my view, the charge is established in my view.

I note once more that it seems that only Hasenfratz was counseled for violating the policy although another employee was involved. Clearly, it

Hasenfratz' August 24, 2000 counseling. The Respondent submits essentially that it had a reasonable basis for believing that Hasenfratz had harassed and intimidated another employee and that under the circumstances, it was obliged, ethically and legally, to investigate and act upon the harassment claim.

In point of fact, I would agree with the Respondent's view of its legal and ethical objection to investigate such behavior. The key word here is "investigate." Here, clearly, there was a complaint lodged against Hasenfratz by employee Griffin. Czyzewski elected not to interview Griffin. However, Czyzewski decided to go to the scene where he confronted Hasenfratz and interviewed him. Czyzewski there determined that Hasenfratz was indeed soliciting in a permissible area and denied harassing and intimidating everyone. Nonetheless, Griffin's report was accepted at face value-Staccone did not know what Hasenfratz actually had said or done to harass or intimidate Griffin. As a consequence, Staccone and Fiock decided that Hasenfratz deserved a discipline equal to that of patient neglect for his conduct in the parking lot while he was off duty. This discipline seems highly reactionary. It is significant to me that Griffin testified that Hasenfratz, at no time ever, made physical or verbal threats to him but merely was pitching the Union in the parking lot; he was more annoyed than threatened. If the Respondent had bothered to interview him personally as opposed to relying on hearsay hysterics, perhaps Hasenfratz would not have been counseled at all.

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takes two (or more) to tango in a distribution transaction-he was soliciting and she was taking the distributed item or other participation. Good-faith enforcement of a policy must include all of the actors. This buttresses my view that Hasenfratz was a victim of discriminatory treatment by the Respondent on May 17.

It seems to me that the Respondent's managers were primed to believe the worst about Hasenfratz and decided to give him a serious discipline for what amounts to his having engaged in protected activity in a permissible area under the Respondent's own policy. I would conclude and find that the Respondent's counseling of Hasenfratz on August 24, 2000, violated Section 8(a)(3) and (1) of the Act.[64]

I. The Complaint Allegations Involving Billie Smith

The complaint alleges (in paragraphs 6, 7, 8, 15, 16, 30 and 36) that with respect to current employee and alleged discriminatee Billie Smith, the Respondent violated Section 8(a)(1) and (3) of the Act on various occasions during a period covering about May 16 through July 13, 2000.[65]

Smith[66] testified at the hearing and stated that she became aware of the Union's organizing campaign sometime in the beginning of May 2000. Smith attended an organizing meeting around May 5 and by chance was interviewed by a

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[64] In so finding, I note that the Respondent, beyond all doubt, knew that Hasenfratz was a union supporter and, in fact, that he was soliciting on its behalf in the parking lot. I believe that the August counseling was simply a carry-over in terms of animus of Hasenfratz' May counseling, which I have found to be discriminatory. I also again note that only Hasenfratz, a union supporter, was counseled in August. However, clearly, Griffin would seem a likely candidate for coaching about the rights of his fellow workers, like Hasenfratz, to engage in protected activity. The Respondent, in my view, simply took advantage of Griffin's claim to interfere with Hasenfratz' activities on behalf of the Union.

[65] At the hearing, the General Counsel requested that par. 8 be amended to substitute admitted Supervisor Gerald Fletcher for the admitted Supervisor Joyce Wilkerson named in this paragraph. The General Counsel also requested that Wilkerson's name be redacted from pars. 15 and 16 of the complaint. There being no objections by the Respondent's counsel, I granted these requests.

[66] Smith has been employed by Flower Hospital for about 13 years as a housekeeper.

reporter for the local newspaper. She stated to him that we (the employees) needed a union, needed to be organized. Smith's comments were later printed in the newspaper about a week later (around May 12).[67] Smith stated that she was engaged in other activities supportive of the Union, including wearing union buttons, badges and insignia, and handing out union literature at the Flower employee entrance and in the hospital's cafeteria.

Smith stated that after the article appeared in the newspaper, she was called into the office of the Director of Environmental services Gerald Fletcher; Smith's immediate supervisor, Joyce Wilkerson, was also present but said nothing.[68] According to Smith, Fletcher said that her name had come up through an unnamed source in the dietary department who said she had been soliciting for the Union while on the job. Smith said that she denied any soliciting but admitted that she (and some other employees) was talking about the Union while working. Fletcher's response, according to Smith, was that he did not wish to see her hurt, that she should only converse with employees during nonworking (off times) and on break.

Smith said nonwork-related conversations and solicitations for products between employees routinely take place on working time and that, in her view, her supervisors are aware of this. However, she conceded the supervisors try to curtail these conversations and solicitations.[69] Smith also

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[67] See GC Exh. 1, an article for The Toledo Blade wherein Smith is quoted as being in favor of a union at Flower.

[68] Smith did not actually give a precise date for this meeting; however, the record supports a finding that it occurred on or about May 16, 2000. (Tr. 767.)

[69] Smith stated that she had observed over the years solicitations by employees for the United Way (charity campaign) and Avon cosmetics. Also, Girl Scout cookies and toys were sold by parents and grandparents for their children's schools. According to Smith, participating employees

stated that nonwork-related conversations and solicitations went on during the union campaign and have actually continued to the present.

Smith further testified that she believed she was being watched, especially after the recent appearance of the news article. She related that about a week after the article's publication, Kevin Web, the chief executive officer at Flower, made a rare and unusual visit to the housekeeping department.[70] According to Smith, Christine Wiltshire, the lead housekeeper, introduced Web to the staff by their first names only. Wiltshire, however, introduced Smith by her full name, which she thought was strange. Smith stated that this meeting covered essentially small talk but that she felt that Web was there looking especially for her and during the meeting simply stared at her.

Smith also related a conversation she had with Wiltshire around July 13, 2000, while she was cleaning a restroom on the ground floor at Flower. According to Smith, Wiltshire asked her what was she doing and Smith, surprised, asked what Wiltshire was talking about. Wiltshire then told Smith that Cathy Middleton[71] had called Wiltshire and said that Smith was (seen) outside soliciting on Flower's time. Smith stated that she told Wiltshire simply, "I'm cleaning, I'm

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did these things out in the open and she, before the Union, sold Avon products at work to coworkers and even to her supervisors, Wilkerson and lead housekeeper Christine Wiltshire. Smith stated that she has never seen a supervisor specifically watching employee solicitations.

[70] Smith stated that Web's visit took place around the same time as the meeting with Fletcher and Wilkerson.

[71] Middleton is the Respondent's clinical director at Flower. Middleton is an admitted supervisor.

working."[72] Smith stated that her cleaning assignments, particularly in July 2000, did not include any areas where Middleton had supervisory authority, and she was never in Middleton's area soliciting for any reason.

On the day in question, Smith stated she was at the employee entrance soliciting for the Union before she clocked in and never approached workers who were themselves working. According to Smith, she was not disciplined by anyone in management for any union-related activities on her part and, in fact, continued to wear union buttons and hand out union literature. However, Smith believed that Wiltshire continued watching her because of her union activities. Smith noted that while Wiltshire was, as part of her job, required to observe her work activities, Wiltshire's observations increased during the union campaign.

Gerald Fletcher testified and acknowledged that he and one of his second-shift supervisors in the environmental services department, Joyce Wilkerson, met with Billie Smith in May 2000 to discuss the Flower Hospital's solicitation and distribution policy 606. According to Fletcher, he had received a call from a person whose name he could not remember, who said that Smith may have violated the solicitation policy.[73] He decided to call Smith in to determine whether she had actually violated the policy and to

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[72] Smith insisted that she was aware of the Respondent's solicitation policy, that she went through employee orientation and received a handbook when she was hired by the Respondent 13 years ago. She stated she and everyone knew employees could not distribute on hospital time, but only on nonworktime and nonwork areas, and no solicitation at all in patient areas. She knew that copies of hospital policies are kept in the housekeeping department and that they were available to her. However, Smith stated she was not aware of the specific policy 606.

[73] Fletcher also stated he could not remember much about the substance of the information he received about Smith.

make sure she understood the policy to avoid her getting into trouble.

Fletcher stated that at the meeting he told Smith of the complaint alleging her possible violation of the policy-he admitted he provided no details to her-and went over the actual solicitation policy. Fletcher admitted that he told her he did not want to see her get in trouble. According to Fletcher, his first concern as a supervisor is protecting his employees.[74] He denied spying on her or following her around the hospital or threatening her in any way. He also denied being under any instructions from management to single out Smith or otherwise pay special attention to her. Fletcher stated he told Smith that she was well within her rights to solicit for the Union but his concern was that she know the policy and protect herself.[75]

Fletcher stated that while Smith's immediate supervisor, Wilkerson, was present at the meeting, she did not speak. According to Fletcher, he, as a matter of practice, likes to have the employees' immediate supervisor in on all employee conferences. Fletcher stated that meeting lasted about 15 minutes and he did not make a written record of the meeting, and Smith received no discipline of any type as a consequence of the complaint.

Wilkerson, who has been employed at Flower for 3-1/2 years, testified and stated that the meeting with Smith was

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[74] Fletcher acknowledged that he did not know Smith very well and had not met her before the meeting. Fletcher stated he worked the first shift and his shift overlaps with her second shift somewhat so that he has had occasion to meet her upon his arrival. He had never coached her before, however, nor any other employee with respect to a possible violation of the solicitation policy.

[75] Fletcher's actual quote is as follows: "I told her she was well within her rights to, you know, she was for the Union. What my concern was that, you know, she know the policy and protect herself." (Tr. 1940.)

called because some of the dietary personnel reported that Smith had solicited them on company time; they were upset and reported the matter to management. According to Wilkerson, Fletcher and she were asked (presumably by management) to review the solicitation policy with Smith.

According to Wilkerson, Fletcher merely asked Smith if she were aware of the solicitation policy; reviewed it with her; told her she was fully within her rights to solicit but only in a manner consistent with the policy. Fletcher encouraged her to solicit but only according to the policy. Wilkerson said that the meeting was very short and Smith said she was aware of the policy but little else.

Wilkerson stated that she did not speak at the meeting and was present only because she normally does this when Fletcher talks to the workers. Wilkerson stated that she, in July 2000, enforced the solicitation policy against an employee who was interested in purchasing Avon products, telling the employee to buy the products on her lunch break or when not on the clock. Wilkerson denied buying any Avon products from Smith.

Wiltshire testified that she has been employed at Flower for about 14 years and has served as the second-shift environmental services leader for the past 6 years; her immediate supervisor during the past 3-1/2 years is Wilkerson.

Wiltshire stated that in July 2000, Wilkerson was on vacation and she stood in for her on the second shift.[76]

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[76] According to Wiltshire, her duties include filling in for unavailable housekeepers and porters; making sure all employees are present and properly doing their assigned tasks; performing housekeeping and porter assignments (e.g., cleaning rooms, mopping floors, and helping with patient discharges); preparing paperwork for the shift, such as employee transfer sheets; discussing new hires with her supervisor and generally substituting for Wilkerson when she is not available. I would find and conclude, in agreement with the General Counsel, that Wiltshire is not a

According to Wiltshire, she received a call from Cathy Middleton, the clinical director at Flower, advising that Smith was in Middleton's area and that Middleton thought Smith should be working (on the clock) in Smith's own work area. Wiltshire stated that she told Middleton she would check on the matter. Wiltshire said she went to Smith's assigned work area and Smith was there cleaning a restroom. Wiltshire stated that she could not recall what precisely Middleton had said Smith was doing in her area but thought Middleton had said that Smith should at the time-around 3:30 p.m.- have been working in her own area. Wiltshire said that she did not ask Middleton what Smith was doing. According to Wiltshire, she could not remember exactly what she said to Smith when she saw Smith cleaning the bathroom and could not recall even whether she told Smith of Middleton's complaint.[77] She could only be sure that she said something to her.

Wiltshire admitted that she has purchased Avon products from Smith but these items were purchased either in the locker room where Smith conducted most of her sales or at lunch, breaktime, or after work. According to Wiltshire, she was aware that employees could only solicit in the cafeteria and breakroom, but certainly not in the patient areas.

Wiltshire admitted that she received literature from employees concerning the Union but never requested a union authorization card from Smith. However, she accepted a proffered card from Smith, but did not sign it.

Discussion and Conclusions of the Smith Allegations

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statutory supervisor but clearly based on her duties, responsibilities, and role, she serves in the capacity of an agent of the Respondent within the meaning of the Act.

[77] Middleton did not testify at the hearing.

The Respondent is essentially charged with threatening Smith with unspecified reprisals because of her union activities; on two occasions, selectively and disparately enforcing its solicitation policy by restricting Smith's union solicitation; on two occasions, creating an impression that Smith's union activities were under surveillance; and, on two occasions, giving Smith a disciplinary coaching because of her union activities.

Preliminarily, it should be noted that the unspecified reprisals charge, one of the selective and disparate enforcement of the solicitation policy, one of the surveillance charges, and one of the disciplinary coachings took place on about the same day, May 16. Accordingly, these charges will be discussed and resolved together, but not necessarily in this order.

The Respondent argues that the May 16 meeting was called by Fletcher as part of his normal investigating practice when he receives reports of his employees violating Flower's rules and policies. Accordingly, the meeting with her was merely to determine from her whether she had actually violated the solicitation policy, understood it, and help her avoid getting into trouble in the future. The Respondent submits that the meeting and all that transpired was calm (and nonthreatening) and not documented, with the result of no discipline being placed on her.

First, Smith, to me, was a very credible witness; she was plain spoken, straightforward, and testified without embellishment about the events in question. I would therefore credit her version of the events that make up the allegations pertaining to her.

As to the surveillance allegations, again, I note that Smith was called in to a meeting only a few days after remarks attributed to her in favor of the Union appeared in the newspaper (recall Hasenfratz). At the meeting, a high level manager, with whom Smith has little contact and who actually does not know her very well, reports to her that an

anonymous employee has reported that she is soliciting for the Union while on the job. This manager provides no details and Smith's immediate supervisor, while present, says nothing. Smith denied soliciting for the Union, but admitted to talking about it in the same fashion and practice other employees often discussed other nonwork-related topics with the supervision's knowledge. Nevertheless, Fletcher evidently believed the anonymous report and went on to warn her so she would not get in trouble in the future.

I believe that the General Counsel has established the charges relating to Smith's May 16 meeting. Regarding the surveillance allegations, it seems reasonable for Smith to believe that she was indeed being surveilled. Certainly, the meeting with a high level supervisor, and her immediate supervisor based on an anonymous and vague charge of soliciting, coupled with a warning that she could get in trouble, was not only coercive but created a clear impression she was being watched because of her union activities.

I would also conclude, under the circumstances presented, that the Respondent disparately and selectively enforced is solicitation policy by restricting Smith's purported solicitation on behalf of the Union. I note that Smith said she was not soliciting but talking about the Union. However, the Respondent's managers thought otherwise. So, consistent with my previous findings that other nonunion solicitations, through laxity and possibly conscious avoidance of enforcement, were not prohibited by the Respondent, I would find and conclude that the Respondent unlawfully attempted to restrict her union activities-in this case, conversations with her fellow workers-through a selective and disparate enforcement of the solicitation policy.

Regarding the reprisal charge, I would find and conclude that under the totality of the circumstances, Fletcher's statement that he did not want to see Smith get in trouble constituted a threat of unspecified reprisal for her continued union activities. I do not credit Fletcher's testimony that he

was in so many words looking out for her as one of his employees. Fletcher had little or no contact with Smith prior to this meeting and, in my view, his remarks to her did not seem genuine. In my view, these remarks were more coercive than protective and interfered with Smith's Section 7 rights.

Consistent with the foregoing, I would also find and conclude that Smith was given a verbal coaching because of her union activities and support. There, of course, was no real dispute that the Respondent knew of her union support and, clearly, Smith credibly stated she was active and open in her activities-hence, the meeting on May 17. Based on my findings of violations of the Act by the Respondent in creating an impression of surveillance, threatening her with unspecified reprisals, and disparately enforcing the solicitation policy, I would find the requisite *Wright Line* animus. I would also find and conclude that the Respondent's defenses, that the coaching was nondisciplinary and/or that the meeting was merely designed to inform her of its solicitation policy, something it would do in any case irrespective of Smith's union activities, are not persuasive. In sum, I would find a violation of Section 8(a)(3) of the Act.

Turning to the alleged July 13, 2000 events, the Respondent contends that as part of her lead housekeeping duties, Wiltshire essentially merely checked on Smith's whereabouts to determine if she were attending to her duties, based on a report from a manager that Smith was on the clock but not in her assigned area; that, upon investigating the report, Wiltshire determined that Smith was working where she should be and conveyed these results to the manager. The Respondent also submits there was no discipline imposed on Smith.[78] The Respondent submits that

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[78] The Respondent argues at length that since Wiltshire was not a supervisor, she could not impose any discipline on Smith.

Wiltshire did not create an impression that she was surveilling Smith on July 13, 2000.

While I have found Smith credible in regard to the May 17 incidents heretofore discussed, I am not similarly confident about her testimony regarding her encounter with Wiltshire, with whom Smith seemed to have a not altogether good relationship and actually seemed somewhat antagonistic to, if not paranoid, about Wiltshire. In the same vein, Wiltshire did not necessarily impress me as a witness, her recall seeming faulty. However, I did not feel she was untruthful. All in all, it is clear that while Wiltshire, in my view, was imbued with agency powers, she could not discipline Smith. Accordingly, I would conclude that Smith was not disciplined in June 13 and that the General Counsel did not establish a violation of Section 8(a)(3). I would recommend dismissal of this aspect of the complaint.

In likewise, I am not convinced that Wiltshire or any of the Respondent's managers could be reasonably seen to have created an impression of surveillance of Smith's union activities on July 13. The evidence on this latter point being in equipoise, I would find and conclude that the evidence is insufficient to find a violation, I would recommend dismissal of this charge.

J. The Allegations Involving Christine Gallagher

The Respondent is again charged in the complaint in paragraphs 12 and 13[79] with selectively and disparately on June 22, 2000, enforcing its solicitation and distribution rule

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[79] Note: At the hearing, the General Counsel requested that par. 13 be amended to add the following in a new allegation numbered 13(b): About June 28, 2000, Respondent, by its agent and supervisor, Cheryl Homan, disparately restricted union solicitations by issuing a disciplinary warning to Christine Gallagher in violation of Sec. 8(a)(1) of the Act. The General Counsel also moved to amend par. 5(b) to allege Homan as a supervisor and/or agent under the Act. I allowed these amendments.

by restricting solicitations and distributions made on behalf of the Union; creating an impression among employees that their union activities were under surveillance; and disparately restricting union solicitation by issuing a disciplinary warning to an employee in violation of Section 8(a)(1) of the Act. These allegations focus on the activities of Christine Gallagher, an active and known union supporter.

Gallagher[80] stated she became aware of the Union's organizing campaign around February 2000 and became actively involved in the effort from late February through the election. Gallagher said that she distributed union literature, made telephone calls on its behalf, spoke to the news media, attended public events sponsored by the Union, and manned union tables set up at both Flower (once) and Toledo hospitals (many times). She also wore openly union paraphernalia-buttons and stickers and, on casual dress days, tee shirts-and acted as a union observer on the 3 days of the election.

Gallagher stated that on June 22, 2000, her team leader, Cathy Schwartz, called her to the office of Toledo's information management supervisor, Joclyn Dalton. Gallagher said she was told that they had received complaints that she had been pressuring employees about the Union. Gallagher said she asked Schwartz and Dalton who was making the complaints and when and where had her offending conduct taken place. According to Gallagher, neither woman would tell her. Both supervisors stated that they understood the matter to be a he-said/she-said situation and, for that reason, no formal action was going to be taken against her, that the information was more in the way of a

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[80] Gallagher is currently employed at the Toledo Hospital in the information management department as a coder two, a data entry position, and has been employed by Toledo since June 1998.

friendly reminder. The supervisors thereupon provided her with a copy of the solicitation/distribution policy (606).[81]

Gallagher also related another incident in which she was accused of violating the Respondent's solicitation policy on June 23, 2000. On the morning of June 23, Gallagher said that she had taken personal leave (until noon) to attend a closing on the sale of her home but the closing was called off. Gallagher then decided around 10 a.m. to go to the hospital's Executive Parkway office building to talk to employees about the Union. While there, she met Union Organizer Carla Logan and they rode the elevator together to the fourth floor transcription office, and stopped at a small employee breakroom. Gallagher said that Logan and she noted that employee work cubicles near the breakroom were unoccupied, so they decided to leave the area after a few minutes. The two then proceeded to the seventh floor financial services breakroom. Gallagher stated that she and Logan sat down at a table and spread out union authorization cards, pens, and literature. After a time, employees filed in the breakroom and initiated conversations with them about the Union; and Gallagher and Logan responded to their inquiries.

Gallagher said that around 30-45 minutes later, two managers, Paula Sohacki and another, who Gallagher later learned was named Diane Hovey, came in the room and asked if Logan and she were Promedica employees. Gallagher told them that Logan was not an employee. Gallagher said she was permitted to stay, but Logan was ordered to leave the premises. According to Gallagher, she and Logan were taken aback by the order because they believed they could solicit in the breakroom and did not

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[81] Gallagher said she was already familiar with the policy, having been given a copy or read it in a departmental meeting shortly after its issuance in January 2000.

immediately leave. A short time later, the same two managers returned and told them that they both must leave, that only financial services employees could use the breakroom. With the two managers watching and waiting to see that they left, Gallagher and Logan left the premises.

Gallagher stated that on June 28, Schwartz once again called her to another meeting with Dalton in her office. This time, however, Cheryl Homan from human resources was present. At this meeting, Gallagher said she was told that the hospital was putting her on verbal reminder (discipline) for what they said was a proven violation of the official solicitation policy 1 day after she had been coached for the same offense. Gallagher said that she was told that a worker in the transcription department had provided a statement that she had been approached in her work area by Gallagher and solicited on behalf of the union. Gallagher responded that this accusation was an absolute lie, as she had only solicited in the financial services breakroom where she had set up a table.

Gallagher said that Schwartz then gave her a copy of an employee communication log[82] with an entry noting the June 22 meeting and a copy of a verbal reminder, setting out her violations of policy 606 and threat of further discipline for repeated violations.[83] Gallagher viewed Homan's comments

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[82] The communication log is contained in GC Exh. 22. Gallagher disputed this coaching, stating that contrary to the written entry, she was approached by a fellow worker who asked her questions and that she Gallagher was not on duty but had stayed after work to answer the questions. The entry stated that Gallagher had asked the on-duty worker questions about the Union and the worker had taken time from his/her duties to answer Gallagher. Gallagher said this was simply not true. I note that the entry concludes with the statement, "We will proceed with appropriate discipline if action reoccurs."

[83] The entire text of the reminder is contained in GC Exh. 23. The document is signed by Schwartz and Homan. Gallagher said she signed the document only to get a copy. I note that this document identifies an

to her of progressive discipline for future policy-related missteps as a threat.

Gallagher said that after this meeting, she reviewed policy 606 and realized (contrary to her verbal reminder) that she had not approached any employees, they had come to her. Moreover, she only spoke to employees in the financial services breakroom on the day in question. Later that day, Gallagher stated that she then decided to go back to Dalton's ofrice-Schwartz, Homan, and Dalton were still there-and told them, explaining her reasoning, that she had not violated the policy. According to Gallagher, Homan said she could file a grievance over the matter.[84]

On June 29, Gallagher received a followup letter from Homan which purported to set out the hospital's position on the incident and her response thereto and warned Gallagher

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employee, Mary Nissan, as having been approached by Gallagher and Logan about the Union.

[84] Gallagher ultimately filed a grievance and specifically denied speaking to the employee mentioned in the verbal reminder discipline and, in fact, did not know her. See GC Exh. 26. Management denied the grievance, but Gallagher ultimately prevailed and the reminder was rescinded in late August or September 2000. I would note at this juncture that neither Dalton nor Homan testified at the hearing. The Respondent indicated in its brief that Dalton resigned her position in September 2000 and moved to Pennsylvania. The Respondent took the position that Homan's testimony was not required at the hearing because the discipline for which she was responsible was later rescinded and is, in its view, therefore moot. Based on the credible testimony of Gallagher and the job title and Homan's part in the issuing of Gallagher's discipline, and there being no opposition by the Respondent, I would find and conclude that Homan is a statutory supervisor and, in the alternative, a statutory agent of the Respondent.

that any subsequent violation of policy 606 will result in further progression of discipline.[85]

Regarding solicitation at the hospital, Gallagher stated that prior to June 2000, she observed employee solicitations of various products and for different causes all over the work area and, in the aisles and cubicles of the office. According to Gallagher, employees sold Girl Scout cookies and Boy Scout popcorn,[86] Tupperware, Avon, candy bars, and solicited for church raffles and school fund raisers; additionally, necklaces and other trinkets were sold routinely at Halloween, Christmas, and as recently as 3 weeks before her testimony at the hearing. According to Gallagher, supervisors clearly have the opportunity to observe these solicitations because the aisles and cubicles in her area are open and such activities are openly conducted by employees.

Gallagher also stated that prior to June 2000, Promedica employees regularly visited other employees' work areas. This was very commonplace in her view, and she pointed out that, in her own experience, employees from other departments visit her as they are performing their jobs. According to Gallagher, no one has been disciplined for intraoffice visits by other employees. Gallagher also stated that she has seen quite frequently nonemployees visiting the worksite, citing as examples, employees on maternity leave bringing their babies in; employees bringing their children to work for doctor's visits; and spouses and parents of employees coming to meet employees and then going out to

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[85] This followup letter is contained in GC Exh. 25. Gallagher stated that the letter accurately reflects the meeting of June 28 and the relative positions of management and herself on the issue.

[86] To buttress her point, Gallagher identified an order form (see GC Exh. 24) for Boy Scout popcorn containing her name and other employees, which circulated in October 2000. Gallagher stated an employee, Billie Thomas, circulated the order form but was not disciplined as far as she knew.

lunch. Gallagher stated that she personally observed a supervisor bring her son back to work after his dental appointment; that employee's supervisor observed this, but nothing was said to her.[87]

Gallagher stated that when the union organizing drive was at its peak, the hospital's solicitation policy suddenly became a "big deal," especially as compared to the time before the Union's advent when solicitations took place very openly. Gallagher pointed out that irrespective of management's changed attitude regarding solicitations, employees continued to solicit but with a little more circumspection.

Catherine Schwartz[88] testified that she counseled or coached Gallagher on June 22, 2000, and made an entry in an employee communication log memorializing the event.[89] Schwartz testified that where the counseling entry indicates that an employee (associate) was writing off worktime to answer Gallagher's questions about the Union, that employee was Joyce Tremko, a coder and one of Gallagher's coworkers.

Schwartz stated that all coders submit to her weekly productivity reports wherein their time is accounted for each day of the workweek. Schwartz said that she examined a weekly productivity report submitted by Tremko for the

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[87] Gallagher pointed out, however, that for the first time, 2 weeks before she testified, the woman's supervisor told her that her son had to leave.

[88] Schwartz has worked for Toledo Hospital for 17 years; she is a coder team leader, holding this position for the past 1-1/2 years and during this time has supervised anywhere from 8 to 23 employees. In June 2000, she supervised six to eight employees, including coders and support coordinators. Based on her self-described duties and her testimony in general, I would find and conclude that she is an agent and/or supervisor within the meaning of the Act.

[89] Schwarz identified the communication log that was contained in R. Exh. 41, (which is identical to GC Exh. 22).

week covering June 16, 2000, and noted that Tremko made an entry indicating that Gallagher had approached her regarding the Union and indicated the encounter lasted about a half-hour.[90] Schwartz regarded Tremko as a very accurate and detail-oriented employee.

Accordingly, while Schwartz could not recall the entire discussion with Joclyn Dalton, a decision was made to counsel Gallagher to make her aware of the solicitation policy.[91]

According to Schwartz, Gallagher was never told she was being disciplined but was told that nothing was formally written up and that the meeting was merely an informal discussion designed to help Gallagher understand the solicitation policy.[92]

Regarding employee Tremko, Schwarz could not recall mentioning her name in the meeting with Gallagher. Schwartz said that she did not believe she ever spoke to

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[90] Schwartz identified the productivity report (R. Exh. 42) which covered the week of June 12-15. I note at this juncture that Gallagher admitted both knowing Tremko and speaking with her about the Union on June 16. However, Gallagher said that on that Friday, Tremko asked her about 15 minutes of questions about the Union, that she was herself not on worktime but had stayed after to answer Tremko's questions. Gallagher admitted that she thought Tremko was probably on duty, but she was not soliciting in her view but merely answering questions.

[91] Schwartz stated that at the time she reported to Dalton, who was the operations manager for the hospital. According to Schwartz, Dalton left the employ of the hospital in the fall of 2000. Dalton did not testify at the hearing.

[92] It is worth noting that the June 22 counseling appears to have been forwarded to human resources on September 20, 2000. Schwartz said that she could not recall sending the counseling to human resources. Schwartz admitted that she was asked to recopy the document and redact an entry following June 22 by her supervisor. Schwartz stated the additional entry related to the June 28 verbal discipline or coaching of Gallagher that she expunged at a later date.

Tremko about the entries in her productivity report because the entries were documented clearly; therefore, in her view, there was nothing really to discuss with Tremko. Schwartz admitted that Tremko, at the time she made the entry, was on worktime because she recalled seeing Gallagher and Tremko together at Tremko's work station. Schwartz stated that although she did not know whether Gallagher was off duty-admitting to a possible overlap in schedules-she concluded that there was a loss of productivity for Tremko, caused by Gallagher in her view. Schwartz admitted that Tremko was never coached for talking about the Union with Gallagher in spite of the 34 minutes of lost worktime; nor was Tremko coached for the time spent speaking with Gallagher about the Union on June 20. According to Schwartz, she had no reason to believe Tremko was soliciting, so no coaching was warranted in her view.

With regard to the June 22 counseling entry's reference to "complaints" received by management against Gallagher, Schwartz stated that prior to June 22, she had received a complaint from another associate, Shirley Pollack, who had complained about Gallagher's reportedly aggressive attempts to solicit on behalf of the Union.

Regarding Gallagher's second discipline, the Respondent called Patricia Appley, the current director of human resources for the Toledo Hospital and Toledo Children's Hospital.[93] According to Appley, she received a report from

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[93] Appley has been serving as director since July 2001 but has been employed by the Respondent for 21 years. She served as acting director of human resources from September 2000 to July 2001. Appley stated that she personally supervised 20 employees and one of her primary functions was to see that hospital policies and procedures, for example, the solicitation policy and the performance improvement management policy, are uniformly enforced throughout the hospital. Accordingly, I would find and conclude that Appley is a supervisor and/or agent of the Respondent within the meaning of the Act.

the then-director of financial services-Diane Hobie-that two persons were in the breakroom with union brochures and materials and were speaking to employees. Appley said she instructed Hobie to tell the nonunion organizer to leave because the breakroom was restricted for the sole use of financial services employees and staff meetings. Appley said she then contacted hospital security and drove from her office to the Executive Parkway Building.

Appley stated she met with Hobie and two other managers, Paula Sahankey and Marshall Holmes, and a security officer; Sahankey and Holmes had been contacted by Kathy Meyer, director of the transcription department, and told of the individuals who had been observed in the area. According to Appley, Meyer said that an employee-Mary Neeson, a medical transcriber-reported that she had been startled by the presence of the two individuals, one of whom was Gallagher. Neeson did not report the matter immediately to Meyer but later had second thoughts and, concerned about security in a nonpublic area, reported the incident to Meyer.[94]

Appley stated that since Gallagher was not assigned to work at the Executive Parkway Building, there was no reason for her to be there that day. Moreover, Gallagher had escorted a nonemployee into the breakroom in a work area of the financial services department and, a day or so earlier, had been coached on the solicitation policy. For these reasons, Gallagher was issued a verbal reminder.[95]

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[94] The General Counsel objected to the hearsay nature of Appley's testimony, a point which I acknowledged. But this testimony was allowed by me to understand better the circumstances leading to Gallagher's second discipline, and not necessarily for the truth of the matters asserted.

[95] Appley stated that a verbal reminder is part of the Respondent's progressive disciplinary process and remains active for 6 months. Employees who receive a verbal reminder are not allowed to transfer to

Appley stated that Gallagher filed a grievance against the Respondent and, ultimately, the discipline regarding the Executive Parkway Building was heard by a panel of peers composed of three employees and two management representatives under the Respondent's grievance process.[96] According to Appley, the record of Gallagher's discipline was removed from her file. As a result, Gallagher is not amenable to any adverse action by the hospital because of the rescission of the verbal reminder.

Regarding the Respondent's solicitation policy, Appley stated that she worked closely with management in the administration of the policy known as 606 as well as its revision in January 2000, effective January 18, 2000. Appley said that she prepared a power point presentation[97] on the solicitation policy (among others) to educate management on the revision so that they, in turn, could inform their staffs of the changes and the proper and consistent application of the revised solicitation policy. According to Appley, the Respondent has attempted to enforce the policy consistently and uniformly and routinely advises managers on the policy. Appley cited several examples of enforcement of the policy against employees, but noted that between January 2000 and

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other positions and may lose their seniority status when a more desirable shift becomes available. Verbal reminders also count as negative points for purpose of the employee evaluations.

[96] Gallagher also sought disciplinary action against management for inducing an employee to make a false report and harassment. The panel of peers recommended that no action be taken against management. It was also disclosed in the review that Neeson later revealed that she was actually in a small break area when she saw Gallagher (consistent with Gallagher's version) and that she was leaving for lunch at the time. Also, the financial services breakroom, it turns out, was used by management for functions where nonemployees attended.

[97] See R. Exh. 53, the power point presentation Appley prepared.

April 2001, no employee had been terminated or even given a written warning for violation of the policy.

Discussion of the Gallagher Allegations

As amended, the complaint essentially charges the Respondent with giving Gallagher two disciplinary actions, one on June 22 and the other on June 28, stemming from the allegedly disparate and selective enforcement of its solicitation policy and creating an impression that Gallagher's union activities were under surveillance.

The Respondent principally argues that the hospital's actions with respect to Gallagher were not discriminatory or otherwise unlawful and that the actions taken were based on employee complaints about her solicitation activities, which the Respondent was within its rights to deal with per the established solicitation policy. The Respondent submits that the employee complaints and the time reports serve as a legitimate nondiscriminatory basis for the hospital's actions against Gallagher. The Respondent reasserts that the June 22 coaching was not discipline and submits that the June 28 verbal reminder was removed, but that in neither case was animus against the Union a factor. Regarding the surveillance issue, the Respondent stands firm by arguing that its actions were based on other employees' reports to management and not because of any of management's observations of Gallagher's activities.

First, I found Gallagher to be a highly credible witness. She testified forthrightly and honestly with corroboration and, with respect to the June 28 discipline, was vindicated. Gallagher candidly admitted she was aware of the solicitation policy and the limits of lawful union activities. I believed she honored those rules and was truthful in testimony regarding her activities on June 22 and 28.

The central issue for me is, in spite of the complaints from employees about the solicitation and Tremko's productivity report entries, was Gallagher treated fairly and on a nondiscriminatory basis? First, it is clear Gallagher was

known by the Respondent to be a union supporter-the Respondent readily concedes this.

Second, I have already determined the Respondent, during this period, was lax in the enforcement of the solicitation policy regarding nonunion activities. Gallagher, like other testifying employees, credibly reaffirms this point. However, it seems that at least during the period the Union was active, violations of the policy were found only where union activities were involved. These union-related activities triggered management's response, usually in the form of coachings of the union solicitation. Yet, it seems other solicitations were taking place but no other employees were officially coached or otherwise disciplined. This, as I have found, evinces a clear pattern of selective and disparate enforcement of the solicitation policy.[98] Thus, the animus element is clearly established. Third, as is obvious, the June 22 and 28 disciplinary actions taken against Gallagher stemmed from her activities on behalf of the Union. It cannot be gainsaid, therefore, that her activities on behalf of the Union were not the motivating factor in her discipline[99] on the two occasions.

I note, as does the General Counsel, with regard to Tremko and Gallagher's encounter, and crediting Gallagher, that Tremko-not Gallagher-was on duty and she discussed the Union with Gallagher. Perhaps, the Respondent could not have known this but with some investigation, for example, interviewing Tremko on this point as opposed to accepting

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[98] I have credited Gallagher's testimony regarding her observations about employees visiting each other, nonemployees visiting the worksite, employees soliciting for various nonwork-related causes and merchandise, and that these activities were commonplace and accepted behavior at her jobsite during the period she received her discipline.

[99] Again, I view the June 22 coaching disciplinary in nature. I note that the Respondent is not charged with violating Sec. 8(a)(3) with regard to Gallagher.

her entry at face value, this point would have been revealed. On the contrary, Tremko was not interviewed, her entry was fully credited, and Gallagher was counseled about what the Respondent perceived as her (and hers alone) violations of the policy. As I have noted heretofore, fairness dictates that when two or more employees are engaged in a transaction or event carrying some consequence vis a vis company policy, an employer exercising good faith will interview all parties and then determine if a violation has taken place and by whom. Here, Gallagher was not accorded basic fairness of process.

The Respondent's June 22 counseling, in my view, was clearly discriminatory and motivated by her union support. I would so find and conclude. Regarding the June 28 verbal discipline, little need be said. Based on what is not much disputed, Gallagher was wrongfully disciplined on that date by virtue of the Respondent's poorly executed and biased investigation of employee complaints about Gallagher's perfectly lawful solicitations for the Union. Thankfully, this latter very serious discipline, which emanated from the supposedly benign June 22 counseling, was rescinded. Nonetheless, I would find and conclude that the June 28 verbal discipline was discriminatorily imposed on Gallagher[100] because of her union activities.

Regarding the creation of surveillance allegations, I agree with the Respondent that it neither surveilled nor created an impression of surveillance in Gallagher's mind. In spite of its unlawful handling of the two disciplines, the underlying complaints either were made by fellow employees or because Schwartz routinely examined the productivity

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[100] The Respondent submits that this discipline was removed, making the matter moot. The General Counsel submits that the removal constitutes an admission of disparate treatment and that a posting of a notice is appropriate irrespective of whether Gallagher's personnel record has been expunged. I agree.

reports of the codes and saw Tremko's entry. I cannot find and conclude under these circumstances that the Respondent could reasonably be said to have created an impression that Gallagher's union activities were under surveillance. I would recommend that the aspect of the complaint be discussed.

K. The Allegations Involving Stacie Hertzch

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily giving an employee, Stacie Hertzch, a disciplinary coaching because of union activities on about July 28, 2000.[101]

Hertzch[102] testified that around February 2000, she became aware of the Union's organizing campaign at Promedica and after a time met with union leaders and became actively involved in the campaign. Hertzch stated that in the spring of 2000, she assisted the union cause by posting fliers on bulletin boards, and distributing and collecting union authorization cards in the hospital's parking lot.

Hertzch recalled that on about July 21, 2000, she discussed the Union with one of the licensed practical nurses (also known as a clinical nurse manager or resident nurse coordinator), Paula Ellinger, in the context of Hertzch's concerns about being short staffed on the night shift, a frequent problem on that shift. Hertzch stated their conversation took place in the hallway by Ellinger's office around 7:30 a.m. and she told Ellinger that if we had a union here, things would have to change, citing as an example, the

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[101] See pars. 38(a) and (b) of the complaint.

[102] Hertzch's name is misspelled in the complaint as Stacey Hartzsh. Hertzch is currently a registered nurse employed at the Respondent's Goerlich Center for Alzheimer Care on the Flower Hospital campus; she has been employed there for 3 years. Hertzch started on the second shift (6:30 p.m. to 7:30 a.m.), part time, from February 2000 through March 2001.

requirement of proper staffing ratios. According to Hertzch, Ellinger said that a hospital is not an appropriate venue for a union, and she did not think it (a union) would change much; Ellinger also said that she did not agree with the Union and did not want to see one at Promedica.[103]

Hertzch stated that on July 28, 2000, her immediate supervisor, Sandy Gang, called her into her office for a meeting. Hertzch noted that Gang was passing out checks (stubs) to the employees at the time, along with a company flier that was antiunion. Gang gave Hertzch her stub and a flier and made certain antiunion comments to her.[104]

According to Hertzch, Gang then proceeded to tell her that Jennifer Wagner, then Goerlich's administrator, had a problem with Hertzch's wearing the wind pants she then was wearing. Hertzch stated that she replied the complaint was petty because she had worn this type of pants for months[105] without incident and others had worn them as well, along

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[103] According to Hertzch, she approached Ellinger about the staffing problem because she was next in charge when the director was on vacation. Ellinger is alleged in the complaint to be a supervisor or agent within the meaning of the Act. She did not testify at the hearing.

[104] According to Hertzch, Gang at the time went over the contents of the flier, saying that basically the union had done nothing for the employees at St. Vincent's Hospital and commented that Promedica was being ambushed by the Union and that a hospital is not an appropriate venue for a union. Hertzch said she said nothing about the Union in response. These alleged statements are not the subject of the complaint.

[105] Hertzch explained the history of dress down or casual Friday on her unit. According to Hertzch, around February 2000, the hospital instituted a casual dress day policy with certain guidelines (see GC Exh. 14) governing the type of clothes one could wear in place of the standard nurse dress code items-professional uniforms, scrubs, nursing jackets, shoes, etc. Friday was designated dress down day. Because wind pants were not listed in the guidelines, Hertzch said she obtained permission to wear them from Gang and wore them from February until around July 29, 2000.

with sweat pants which were not allowed. According to Hertzch, Gang merely said that Wagner was the boss and her decision must be followed. Hertzch stated that after this conversation, she decided no longer to participate in Friday "dress down" days, and thereafter wore standard nurses' garb.

Hertzch noted that she requested from Gang a clarification of the policy shortly after this meeting and, in response, Gang sent her a note purporting to clarify the dress down guidelines[106] and also later posted a note on the unit bulletin board announcing that the designated dress down day was Friday at 12 midnight.[107]

Hertzch also said that she informed other unit employees about the wind pants prohibition to give them a "heads up" on the matter but noted that some continued to wear them without intervention by management as far as she knew.

Hertzch admitted, that other than Ellinger, she spoke with no other persons associated with management about her union activities or sentiments and, to her knowledge, no one from management observed her handing out union written materials.

Hertzch stated that in her mind she received no discipline of any kind after the July 27 meeting with Gang and that she continued with her normal work schedule, received her pay raises and benefits when due, as well as her vacation or time off, and generally saw no dramatic changes in her work life.[108]

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[106] See GC Exh. 16, a memo from Gang to Hertzch dated July 31, in reference to the dress code and wind pants.

[107] See GC Exh. 18.

[108] Hertzch has been recognized as an excellent employee and was nominated for nurse of the year by the hospital. Counsel for the

However, upon being shown a copy of a communication written by Gang referring to, among other matters, her July 27 coaching, Hertzch stated that she had only seen this when it was presented to her by the General Counsel prior to the trial.[109] Hertzch stated that she disagreed with an entry implying that she dressed inappropriately on days other than dress down day; that she had never heard of any complaint along those lines at any time, and certainly not at the meeting with Gang. Hertzch also could not recall any conversation in the meeting about wearing a nursing jacket over shirts when not on dress down day; and she did not recall reaching an agreement with Gang about her pants.

Gang[110] testified that she coached Hertzch in her office on July 27, 2000, based on a complaint she received from then Goerlich Nursing Home Administrator Jennifer Wagner (Gang's supervisor), who said she had observed Hertzch inappropriately dressed on days other than casual or dress down days.[111] Gang stated that on July 27, Hertzch was

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Respondent acknowledged that her evaluations have been good and, in fact, stipulated that she was an excellent employee.

[109] This communication log is contained in GC Exh. 18 and also includes Gang's entries for July 12 and 26, 2000. It is notable that the July 26 entry relates to Hertzch's stated concern about staffing and other "written concerns" she made in a voice mail to Gang. The July 27 dress code coaching is recorded thereafter (R. Exh. 36 is identical to GC Exh. 18).

[110] Gang, an admitted supervisor, during July 2000 served as the director of nursing at Goerlich and in that job supervised around 45-55 employees, including registered nurses, licensed practical nurses, nursing assistants, housekeepers, recreation therapists, and maintenance workers. Gang currently works at Lake Park, a 230-bed, skilled nursing home facility located on the campus of Flower Hospital.

[111] Wagner is no longer employed with the Respondent and did not testify at the hearing. According to Gang, Wagner disagreed with her on the propriety of wearing wind pants and overrode her decision to allow

wearing wind pants, a tucked-in tee shirt with no laboratory jacket, and her hair was pulled up and "hanging all over"-sloppy in a word. According to Gang, the July 27 coaching had nothing to do with Hertzch's wearing wind pants because Hertzch had previously obtained her permission to wear them as long as they were neat and clean, not only on casual Fridays but also on Monday through Thursday. Gang noted, however, that Wagner did not agree with her regarding wind pants as acceptable attire.

According to Gang, Hertzch's overall appearance was the issue on that day and the coaching lasted only a short time-not long enough even for the two to sit down. Gang denied beginning the session with giving Hertzch any fliers about the Union. Gang stated that Hertzch received no formal discipline but the coaching was recorded in a communication log.[112]

Gang stated that at the coaching session, she told Hertzch that tight knit shirts were prohibited and a tucked-in top should be covered with a lab jacket, because the discussion was more related to her general appearance on days other than dress down days. According to Gang, she discussed everything covered in the communication log, stating that Hertzch essentially was not coached for noncompliance with the dress down guideline, but mainly for dressing on other

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wind pants. Gang, however, said she issued no notices on the topic of wind pants.

[112] Gang acknowledged that the communication log, while an informal record, helps managers track trends over the year so that when their (evaluation) year comes due, managers have adequate information. Gang stated that she uses the communication log to coach, guide, or educate employees on different policies or guidelines, and to see that employees follow through and adhere to them; the log entries are also used to provide adequate documentation to refer to if needed; and to justify having talked to the employee. (Tr. 233-234.)

days (Monday-Friday) in apparel that did not meet nurses' uniform protocol.

Gang stated that a few days after the July 27 meeting, Hertzch asked for formal guidance regarding the dress code at Goerlich and in response she addressed a memorandum to her covering dress down guidelines and the personal appearance and hygiene policy of the center.[113]

Gang stated that she has coached other employees regarding Goerlich's dress code and that Hertzch's union activity did not enter into the counseling and, in fact, the Union was not mentioned at all.[114] Gang admitted she was aware of the Union's organizing efforts at the time, as they were ongoing throughout Promedica. Gang stated that she discussed the Union with her employees, especially when upper management passed on information about the Union to her. Gang admitted that notices about the Union were handed out personally by her and other supervisors but could not recall handing out such materials with the paychecks. Gang also acknowledged having conversed with Hertzch and other unit employees about the Union but said nothing more than was contained in the general employer-supplied materials; she denied expressing her opinion on the hospital's position about the Union with Hertzch. Gang said that she spoke to her employees about the Union in unit meetings but she read only "facts"[115] provided by management designed to encourage employees to make an openminded decision about the Union.

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[113] Gang identified R. Exh. 38 as the memo and the enclosures covering dress down, and the appearance and hygiene policy 609. This exhibit duplicates GC Exhs. 15, 16, and 17.

[114] As I noted on the record, R. Exhs. 39 and 40 reflected coachings by Gang of other employees for dress code issues after July 2000; that is, on various dates in January and February 2001.

[115] Gang could not recall what the specific "facts" were.

Gang denied making any statements to employees to encourage a vote against the Union or that a vote for the Union would not be in their best interests. Gang could not recall talking about the Union's representation of St. Vincent's employees or that the materials she distributed mentioned that hospital. Mainly, according to Gang, she read all the materials passed out to her employees and answered any questions based on the materials.

Gang stated that (in spite of the coaching) she viewed her working relationship with Hertzch to be positive and even offered Hertzch a staff development position when Gang moved to a new position at another of the Respondent's nursing homes; Hertzch declined to accept this position for personal reasons.

Discussion and Conclusions of the Hertzch Allegations

The Respondent contends that, basically, Hertzch was coached because her superior felt that her overall appearance was not appropriate and although her immediate superior, Gang, had approved wearing wind pants. The Respondent submits that Gang credibly testified about the nature and reason for the July 28 coaching of Hertzch and, specifically, Hertzch's union activities were not implicated in the meeting. The Respondent submits that neither Gang nor any other manager or supervisor knew of Hertzch's leanings toward or activities in support of the Union. The Respondent asserts that Gang had no personal and, certainly no union-related antagonism, against Hertzch, as evidenced by Gang's taking special effort to clear up any confusion Hertzch may have had about the dress code and even later offering Hertzch a staff development job with her at another Promedica facility. The Respondent contends that the General Counsel has failed to meet its *Wright Line* burden and the charge should be dismissed.

I would agree with the Respondent. The principal defect in the General Counsel's proof regarding the Hertzch allegations relates to the knowledge element-the

Respondent's knowledge of Hertzch's claimed union activities. The General Counsel argues that Ellinger, the acting nurses director who, according to Hertzch, frequently stood in Gang, was an acting supervisor or at least an agent of the Respondent. Ellinger's anti-union comments as well as Hertzch's discussions about the Union, the General Counsel submits, are sufficient to impute knowledge of Hertzch's prounion sympathies to the Respondent. The General Counsel also argues that Hertzch's union activities were sufficiently open to impute knowledge thereof to the Respondent.

I believe, on this record, there is insufficient evidence of Ellinger's supervisory or even agency status within the meaning of the Act. This burden is borne by the General Counsel and, in my view, Hertzch's testimony is not sufficient to establish these statutory roles. Also, while Hertzch may have openly engaged in the activities she claimed, this is not, in my view, a legally sufficient basis to impute knowledge thereof to the Respondent. Second, even if I were, arguendo, to find that the General Counsel had met his prima facie *Wright Line* burden, I, nonetheless, would not find a violation of Section 8(a)(1). Significantly, in agreement with the Respondent, I believe that an employer has the right to maintain workplace decorum and the "dress code" established for the hospital nurses here seems reasonable and appropriate. Wagner and/or Gang felt that Hertzch's appearance was not appropriate for a unit nurse. They counseled her about that matter and not about her union activity, I might add.[116] The counseling in this context was lawful and, in my view, would have taken place even if

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[116] In this regard, I have credited Gang's testimony regarding her part in the counseling session with Hertzch. Notably, Gang's subsequent memo to Hertzch as well as the July 27 coaching record in the communication log are consistent with her testimony and serves as adequate corroboration of her testimony.

the Respondent knew of Hertzch's union activities and support. I would recommend dismissal of this aspect of the complaint.

L. The Complaint Allegations Involving Cynthia Miller

In paragraphs 17, 18, and 37 of the complaint, the Respondent is charged with violating Section 8(a)(1) and (3) of the Act with respect to the activities of employee and alleged discriminatee Cynthia Miller.

Miller testified that she was employed at Toledo Hospital as a registered nurse from about October 1986 through October 2001, working on a per diem basis in the labor and delivery unit; her immediate supervisor during 2000 was Somer.[117]

Miller stated that on July 25, 2000, Somer called her at her home and informed her that Post-Partum Unit Supervisor Barbara Hammons had told Somer that Miller had been observed in that unit passing out union materials. Miller said she admitted to Somer that she was indeed in the post-partum unit area but merely attempting to deliver candles she had sold to unit clerk Lana Bell, but not any union materials.[118] According to Miller, Somer seemed relieved with her explanation. Somer went on to advise her of another

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[117] Miller was terminated by the Respondent about 2 weeks before her court appearance. This discharge is not the subject of any of the complaint allegations in this case. Miller said that as a per diem nurse, she had no set schedule and received no benefits or sick leave. She was required to work at least 24 hours per month, 16 of which had to be worked on weekends, but was called in only if the unit needed her. Miller said she, in practice, usually worked full time 3 days per week.

[118] Miller admitted on this occasion that Hammons advised her that Bell was just starting her shift and it appeared to her that Hammons did not want Miller there. Miller simply left the unit on that note. According to Miller, Bell worked an odd shift which did not overlap with Miller's so she came to the unit on a day Miller was not scheduled to work until about 15 minutes before the clerk's shift began.

complaint. Miller said Somer told her that an employee had complained about Miller's having called the employee at home to talk about the Union. According to Miller, Somer conceded that anything Miller did on her own time was her business, to which Miller merely said this was correct. Miller recalled that Somer also told her that the hospital did not want "us" (presumably other union supporters) distributing union materials in the nurses' station.[119] Miller stated that she also recalled Somer saying at the end of the conversation that "public areas" were permissible areas for solicitation. However, Somer did not mention any specific areas such as the parking garage or the cafeteria being places where solicitation could be undertaken.

According to Miller, she was not delivering or attempting to deliver anything but the candles on the day in question, but she did give Bell her personal telephone number and address and asked her to call her to arrange for the pickup of the candles because she was not allowed to give the candles to Bell.[120]

Miller stated that before this litigation, she had never seen (in writing) the hospital's official solicitation and distribution policy. In fact, she saw policy 606 in written form only when the union representatives showed it to her much later.[121] Miller admitted that she had a general understanding of the

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[119] Miller said that at the time she was trying to deliver the candles, she was near the nurses' station at the intersection of two hallways but not in the hallways by the patient area.

[120] Miller could not accurately recall whether on the date in question she was approached by any employee regarding the union campaign. If she had, she would have answered the employee's question. However, she insisted that she was not on the unit to solicit for the Union and was there for only a few minutes.

[121] Miller was shown a copy of policy 606 (as contained in GC Exh. 5) by the General Counsel, and she stated she had not ever seen it before this instant litigation.

rules or policy; that is, she could not solicit except on her breaktime and not on the hospital's time or on hospital premises.

Miller said that she has quite often observed employees soliciting for various products for a number of purposes during her time with the Respondent. Miller related that often in the fall, when school terms begin, employees engage in fundraising activities and "Discovery" toys are sold at Christmas. She also noted that Tupperware, Longaberger baskets, Mary Kay cosmetics, and Party Light candles are solicited and the products sold out in the open. Miller stated she has seen brochures and literature for these items in the nurses' station, the special care unit, the labor and delivery area, and the triage room.[122] According to Miller, these products were openly discussed by employees and the books examined in the nurses' station, and occasionally products were delivered there to purchasers.[123] However, Miller could not say she ever observed Somer either permitting solicitation activity on worktime or removing books and brochures; nor had she ever observed Somer watching others engaging in solicitations of this type of activity.[124]

Miller also admitted that Somer never said that she was watching her because she was helping the Union. Miller said she, nonetheless, felt this was implied. Miller stated that

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[122] Miller identified GC Exh. 3, the front and back cover of a Candle Light order book that she found in August 2000 in the first aid room. She knows the person who owned the book, Melissa Lankey, who was not associated with Miller, and who also sold Candle Light products. Miller said she placed the date "8/11/00" on the brochure.

[123] Miller said that she saw nurse Marsha Reinzer drop off Mary Kay products to a nurse at the nurses' station; and another employee deliver basket products to another employee, also at the nurses' station.

[124] I would note that Miller was very hesitant and somewhat evasive when asked questions about Somer's knowledge of solicitations by the Respondent's counsel.

because of the ongoing nature of the solicitation (and selling) of various products at the nurses' stations, she believed she was permitted to deliver candles there. In fact, she thought that the solicitation policy only referred to union materials.

Miller admitted that she called employees during July and August 2000 at their homes to answer questions and solicit support of the Union, that she obtained their numbers from the UAW. However, Miller stated she knew of no policy in labor and delivery regarding the disclosure and use of employees' private telephone numbers. According to Miller, employees customarily respected any employees' not-to-be called notations by their names on the rosters. Miller denied giving any employee numbers to the Union.

Miller stated that as far as she knew, she was not disciplined; that is, reprimanded or suspended by Somer as result of their conversation. She could recall nothing of an adverse nature taken against her by the hospital.[125] However, when the General Counsel showed her a July 27, 2000 communication log[126] written by Somer regarding their conversation, Miller stated that Somer never showed this to her. According to Miller, she was not sure of what purpose or purposes the communication logs served but thought they were placed in an employee's file and used as part of the evaluation process. Miller said that she could not recall having been previously "coached."

Regarding her union activities, Miller stated she attended union meetings, distributed literature at the hospital entrances, the parking garage, and public areas, and made telephone calls on behalf of the Union before and after the July 25 coaching.

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[125] Miller was of the opinion her later subsequent discharge was related to her union activities.

[126] See GC Exh. 4, an employee communication log indicating Somer's coaching of Miller. R. Exh. 44 is a duplication of this exhibit.

Somer explained her handling of the complaints against Miller, which resulted in Miller's coaching. According to Somer, Hammons, a postpartum unit supervisor, told her that Miller was at the nurses' station there soliciting and distributing union materials; and that three of Hammons' employees were angry about Miller's having called them at home and believed the hospital had given their numbers to her. Somer stated that her understanding was that Miller was off duty at the time of the solicitation, but the employees to whom she was speaking were on duty in patient care areas.

Somer said that on July 27, 2000, she discussed the matter with Miller. Miller said that she was in Hammons' unit to distribute candles she had sold at a party. According to Somer, she reviewed the hospital's solicitation/distribution policy with Miller because she viewed Miller's conduct as violative of the policy. Somer said that she told Miller she could solicit on nonwork-time in public areas. Somer admitted that she probably told Miller that what she did on her own time was her business.

Somer stated that she had enforced the solicitation policy against other employees since her takeover of the labor and delivery unit in May 2000, and has not ever permitted violations that come to her attention.[127] Somer stated that the

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[127] Somer cited several examples of her enforcement efforts. It is not clear whether these occurred before, contemporaneous with, or after the Miller incident. I note, however, that the Respondent called one Luanne Andrews, a support coordinator who reports to Somer, to corroborate Somer. Andrews stated that she is aware of the hospital's solicitation and distribution policy. According to Andrews, she has observed Somer, since May 2000, enforce the policy by confiscating books and writing up employees caught soliciting, and has filed these in their files. Furthermore, she knew that Somer has coached or disciplined employees for nonunion-related solicitation because she filed the communications logs, but had *not* seen Somer enforce the solicitation policy against union solicitations. In passing, I note that Andrews stated she did not engage in

problem with nurses' soliciting and selling at the nurses' station is that patients and family may take the view that the nurses are so busy selling and buying products that the nursing care is substandard. So this activity is viewed as inappropriate by the hospital. Somer, nonetheless, admitted that she has seen various brochures (for Avon, Tupperware, and candles) in and around the patient care areas of the hospital. When she sees them, she either throws them away or, if a name is on the brochure, she returns it to the person and tells her that this activity violates the policy.

According to Somer, her coaching of Miller was based solely on what Hammons told her in a conversation between them. Somer conceded that Miller works the night shift and was off duty at the time, so Somer (by implication) admitted she had no firsthand knowledge of what had actually transpired on Hammons' unit. Somer admitted that she did not investigate the matter beyond her conversation with Miller. According to Somer, her coaching of Miller was not disciplinary in nature.[128]

Moreover, Somer stated that "we all" knew Miller was very active with the union cause and that there were also many people active in the union campaign. However, Somer denied telling Miller that she was watching her or that she created an impression of watching or keeping track of her union activities. Somer denied that the coaching she undertook was based on Miller's union activities; rather, compliance with the solicitation policy was the issue.

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any union activities, and there was no cross-examination of this witnesses by the General Counsel or Charging Party Counsel.

[128] On cross-examination by the General Counsel, Somer stated that her practice is to document noteworthy matters that may require followup and to make notes on violations of rules, such as the solicitation policy.

Regarding the employee complaints about being telephoned at home, Somer stated that complaints of this nature were coming in to her every day but that, in point of fact, Somer, following hospital policy, did not give out employee numbers. Somer stated that Miller did not denying making the phone calls but would not tell her how she obtained the numbers, except to say she got them from a friend. Somer stated that employee telephone numbers are available in each nursing unit but policy dictates that these numbers be used only for work-related purposes.

Barbara Hammons[129] testified that she knew Miller as a nurse working in the labor and delivery unit. Hammons stated that she had received complaints from two of her unit employees-nursing assistant Judy Barkley and nursing assistant/unit clerk Lana Bell-regarding Miller's having called them at their homes about the Union. The employees questioned her on how Miller had obtained their numbers. Both stated that they did not want calls for or against the Union at home.[130]

Hammons said that on a prior date she was not sure of, she had counseled Bell for carrying on personal business on work-time. On the day in question, Bell was scheduled to report to work at 2:30 p.m. and the unit was particularly busy receiving admissions. Hammons happened upon Bell and Miller in conversation in the middle of the third-floor north

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[129] An admitted supervisor, Hammons has worked for the Toledo Hospital for 23 years; she supervises in the obstetrics and nursing unit about 123 employees, approximately 70 percent of whom are registered nurses; the balance are licensed practical nurses, unit clerks, and nursing assistants.

[130] Hammons said that the telephone issue for Bell predated that of Barkley whose complaint was made, she thought, in December 2000 or January 2001. Hammons said at least with respect to Barkley, she told her there was not much she could do about this but assured her that Hammons did not give out employee numbers.

nursing station (3N) around 2:30 p.m. Hammons stated that because she had previously allowed Bell the early morning and afternoon off, and the unit was without a clerk at the station most of that day, she wanted Bell immediately to be on duty. According to Hammons, Miller was in street clothes, obviously not on duty, and considering that two patients were awaiting admission, she told Bell and Miller, "not now." Then a few minutes later, she observed Miller and Bell still conversing. Hammons said she again said, "[N]ot now." According to Hammons, Miller looked at her and asked whether Bell was on worktime, to which Hammons responded, yes. Miller then left a few minutes later.

Hammons stated that on this occasion she was particularly irritated with Bell and Miller because the unit was busy and she had to ask them repeatedly to cease their conversation, she decided to counsel Bell immediately and later reported Miller to Somer.[131]

Hammons stated that in her counseling of Bell, she found out from Bell that she had asked Miller to come in before Bell was due for work to talk about Miller's calling her at home on her unlisted number. Bell said she had wanted to clear the matter up there and then, before work, but she was running late, so the meeting spilled over unintentionally into worktime. Bell apologized for the incident.

Hammons stated that she reported the matter to Somer, telling her that Miller was in street clothes on her unit interfering with Bell's performance of her duties and that Miller was repeatedly (four times) asked to leave the unit. According to Hammons, before speaking to Bell, she did not

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[131] Hammons said that in spite of the urgency of the admission situation, she, nonetheless, decided to coach Bell immediately because management policy favors such action. She thought the coaching would be of short duration and there were no actual emergencies at the time.

know what Miller and Bell were talking about. Hammons admitted that she did *not* tell Somer that Miller was engaged in union solicitation at the nurses' station.[132]

According to Hammons, Bell was annoyed at having received a call from Miller at home on her unlisted number. However, the issue for Hammons was both Miller and Bell's conversing while Bell was on duty at a time when the unit was busy.[133] Accordingly, both were counseled.

Discussion and Conclusions of the Miller Allegations

The Respondent is essentially charged with selectively and disparately enforcing its solicitation policy against Miller, creating an impression that it was surveilling her, and giving her a disciplinary coaching because of her union activities and support; these charges all emanate from the July 25 counseling session.

The Respondent principally contends that Somer, consistent with her practice and duties, questioned and counseled Miller on the policy and its coverage after having received a report from another unit supervisor that two different employees had complained of Miller's having called them at home on their unlisted telephone numbers and had questioned the hospital's involvement; and that Miller had solicited an on-duty employee at the nurses' station and refused to leave the area after reputed requests to do so. The Respondent argues that the counseling and Somer's enforcement of the solicitation policy was not discriminatory, nor disparately and selectively applied to

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[132] I would note that this admission on cross-examination by the General Counsel was made after much of what I would call "hemming and hawing" by Hammons.

[133] Bell did not testify at the hearing. According to Hammons, Bell did not mention anything about a candle order. Hammons said that she did not observe any products or money exchanged and did not see an order book. The Respondent did not produce a coaching document for Bell.

Miller because of her union activities. The Respondent again contends that the coaching is not disciplinary and that even Miller admitted she was never formally disciplined.

As to the surveillance allegation, the Respondent contends that Somer was simply enforcing work rules when she acted on the report of complaints from employees and a unit supervisor about Miller's behavior. The Respondent submits that, in the context, there was no watching or surveilling of Miller because of her union activities. Therefore, under the circumstances, no reasonable employee could interpret the Respondent's response to actual complaints as indicative of surveillance of her union activities.

While it is not crystal clear what Hammons actually reported to Somer, it seems that the report did include a reference to Miller's engaging in some union-related activities with another employee who was working.

Somer's communication log indicates as much as she wrote that Miller was "discussing union activity and soliciting employees. The latter point on solicitation Hammons denied. I agree with the General Counsel that Somer and Hammons contradicted one another somewhat in terms of what was reported about Miller's "solicitation" activities. In any case, Somer's counseling centered on permissible solicitations at the nurses' station and only peripherally on calling employees at home. I will focus on this solicitation issue since this is the gravamen of the charge against the Respondent.

I have previously determined that the Respondent's enforcement of the solicitation policy was at best lax. Again, Miller testified credibly, consistent with other employees, that she, too, observed all manner of nonwork-related solicitation and distributions openly going on at the nurses' stations, so much so that she felt that delivering candles was permissible; that only union solicitation was forbidden. I recognize that Somer said she, as of May 2000, when she assumed her position in the unit, consistently tried to enforce

the policy, and her testimony was corroborated by Andrews. However, it is clear to me that she only acted on improper solicitations that came to her attention and she saw evidence that nonwork-related solicitations were occurring in patient areas.

Therefore, because Miller's counseling at its core was based on what Somer thought was her soliciting for the Union, I would find and conclude that the General Counsel has clearly established that the Respondent disparately and selectively enforced the policy against Miller because of her union activities. I note that Bell, the other and equal participant in the Miller conversation, only received a verbal counseling. Miller, on the other hand, the person generally known by Somer and other supervisors to be a union supporter, received a verbal counseling, which was documented. This buttresses my view that not only was the solicitation policy disparately and selectively applied to Miller, but that her coaching was also discriminatory. I would find and conclude that the Respondent violated Section 8(a)(3) and (1) on July 25, 2000.

As to the surveillance charge, I would acknowledge the General Counsel's point that Miller was not told of the identify of the employee who complained of her calling them at their homes, although I suspect she knew that Bell was one of them.[134] Further, Miller admitted to calling employees at their homes to garner their support for the Union and probably knew or should have known some employees would take umbrage at this and complain to the hospital. On balance, under the circumstances, I cannot find and conclude that Miller could reasonably conclude that she was being surveilled or that the Respondent created such an

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[134] I would note that I had some doubt about the testimony of all of the witnesses to this account, including Miller, who at times was evasive and exhibited a somewhat hostile or edgy demeanor.

impression. I would recommend dismissal of this aspect of the complaint.

M. The Unfair Labor Practices Allegations Occurring Prior to the Four Union Elections in April 2001

In paragraphs 19 through 29 (inclusive) of the complaint, the Respondent is charged with violations of Section 8(a)(1) of the Act for conduct occurring after the Union filed election petitions for the four bargaining units in question.[135]

As noted earlier herein, the Union's objections to the election were determined by the Region to be identical to and/or coextensive with certain of the unfair labor practice allegations. Accordingly, Objection 5 is associated with complaint paragraphs 19, 20, and 21.[136] Objection 10 relates to complaint paragraphs 19, 20, 21, 22, 28, and 29, with paragraph 22 dealing with the proposed support services unit and the others tied to the proposed technical unit. Objection 23 relates to complaints paragraphs 23, 24, and 25; paragraph 23 involves the support services unit; and 24 and 25 pertain to the technical unit. The catchall objection relates to and encompasses paragraph 27 of the complaint[137] and applies to both the technical and support services Units. These objections form the basis of the Union's request to set

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[135] See GC Exh. 2, order directing hearing on objections, order consolidating cases and notice of hearing.

[136] It should be noted that the complaint allegations in par. 20 were withdrawn by the General Counsel at the hearing.

[137] The Acting Regional Director indicated that certain evidence presented by the Union in support of the catchall objection pertained to events that occurred outside the critical period of the petitions. However, the Acting Regional Director ordered the issues raised by the catchall objection be consolidated with the unfair labor practice allegations in par. 27 because of their relationship to the alleged rescission of previously promised raise increases as charged in par. 27.

aside the election results and order a new election in the support services and technical units.

1. The allegations involving the Respondent's implementation of a 401 (k) pension plan (Objections 5 and 10)

In paragraphs 19 and 21 of the complaint, the Respondent essentially is charged with threatening their employees with either probable loss and/or not having a 401(k) employee pension benefit plan if the Union were elected during the critical election period-February 14 through April 6, 2001.

By way of background, it is clear on this record that the Respondent, at least as of June 2000, had commenced plans to change to its then-existing employee pension plans, and these proposed changes were communicated to employees periodically through the hospital newsletter, Newslink. In February 2001, the Respondent, after a rather lengthy process involving the highest levels of management, announced that the new pension plan was scheduled to be implemented by July 2001. By March 15, 2001, the Respondent had announced to employees that the selection of a 401(k) vendor was imminent; and by March 29, 2001, employees were informed that one had been selected.[138]

The General Counsel concedes that the announcement of the approval of the plan and its anticipated implementation in July 2001 was communicated to the employees before the election petitions were filed. However, the General Counsel

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[138] See R. Exhs. 18-22, copies of the Newslink, which outline the progress of the implementation of the 401(k) plan. Regarding the Respondent's longstanding plans to change its then-existing pension plan to a 401(k) plan, I have also credited the testimony of Barbara Steele, president of Promedica Health System central region. Steele testified credibly and at some length about the Respondent's decisional process to implement a new employee retirement plan and, in summary, indicated the decision was a "done deal" by the end of 2000.

(and the Union) contends that during the election campaign, on at least two occasions, the Respondent's supervisors made statements to employees that they would not get the new plan or its implementation would be delayed if they selected the Union.[139] The General Counsel called Lora Hyde and Cathy Harris to establish these charges.

Lora Hyde[140] testified that during February and or March 2001, she attended several employer-sponsored meetings at which certain management representatives gave presentations about and regarding the ongoing union organizing campaign. Hyde recalled one such meeting in late February or early March at the North Campus Lab at which about 20-30 workers were present where Barbara Newman, the technical director of the North Campus Lab, and Pam Costello, a coordinator for the hematology unit, gave a presentation that included the election date, bargaining unit membership, voter eligibility, and benefits. Hyde stated that a coworker, Emily Witty, asked the presenters whether the 401(k) plan would still be implemented in July 2001. According to Hyde, Newman said that if the Union came in, the 401(k) would probably not start in July.

Hyde stated that she later discussed Newman's remarks about the 401(k) with Witty and another employee, Sherrie

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[139] It should be noted that the complaint allegations do not charge that the plan would be delayed if the Union were selected. The General Counsel did not move to amend the complaint to add this charge at hearing or in his brief.

[140] Hyde is currently employed at the Toledo Hospital as a first-shift laboratory technologist (lab tech I) at the North Campus Lab in the microbiology department. She has been employed by the hospital for about 12 years. Hyde stated that she was an eligible voter in the technical unit.

Schreiner,[141] and that Witty repeated Newman's remarks about the 401(k).

Hyde stated that Newman also said, in the context of her remarks about the 401(k) plan, that everything would be subject to negotiation (if the Union were voted in). However, Hyde acknowledged that Newman did not at any time say the 401(k) was going to be rescinded or withdrawn or canceled because of the Union.

Cathy Harris[142] testified that within a month or perhaps even 2 months of the April election, she and Paul Toth, the manager of the hospital's computer operations and her immediate supervisor, were discussing a work-related issue outside of his office door and Toth turned the discussion to the Union.

According to Harris, Toth first asked her how she felt about being ineligible to vote in the election. Harris responded that she was not aware of her ineligibility and told Toth, who continued to ask her about her feelings, that she did not want to discuss the matter.[143] Harris stated that Toth then asked her what she thought about the hospital's getting the 401(k) plan for the employees, and then asked rhetorically did she realize that if the Union gets in here,

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[141] I note that Schreiner testified at the hearing but did not corroborate Hyde regarding the occurrence of this discussion. In point of fact, neither the General Counsel, who called her, nor the Respondent, asked Schreiner about this matter.

[142] Harris is presently employed as a computer operations specialist in the data processing department working on the 9 p.m. to 7:30 a.m. (third) shift at Toledo Hospital. She has been employed with the hospital for over 18 years.

[143] Harris stated that later she learned from a union representative that the computer operators like herself were not eligible and, later, still that computer operators were going to be allowed to cast ballots but subject to challenge. Harris did cast a vote in the election.

employees who are in the Union will not get the 401(k) and those employees who are not in the Union will. Union employees will have to bargain for it.[144] Harris stated she told Toth that that was fine with her and made a joke that the hospital presently gives away free popcorn and maybe we will have to bargain for that also. According to Harris, Toth merely laughed and said "yes."

Harris stated that to her, Toth, in effect, was saying that it-the 401(k)- was going to be an issue, that it had to be bargained over; that Toth made no threat and did not ask her if she were going to vote for the Union or whether she was going to vote at all. According to Harris, this entire conversation lasted about 20 minutes.

The Respondent called Newman, Costello, Emily V[illegible], and Paul Toth to refute the allegations regarding the 401(k) matter.

Newman testified that she has been employed at the Toledo Hospital for about 30 years and currently serves as the technical manager of the North Campus Laboratory. Newman stated that she participated in all three of the presentation types-issues and answers, power point, and video-that the Respondent conducted throughout the election campaign.

Newman stated that the Respondent's consultants provided presenters such as herself with advance training in the use of the presentation materials. According to Newman, she was instructed not to spy on employees or coerce, threaten, interrogate, restrain them, or promise employees anything.

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[144] Harris gave this version of Toth's statement on cross-examination by the counsel for the Respondent. On direct examination by the General Counsel, Harris said that Toth said, "What do you think about the hospital getting the 401(k) for the employees? And you realize that if you're voted into the Union you will not get the 401(k), and those employees who are not in the union will get that." (Tr. 650.)

The consultants, according to Newman, said presenters could give facts, their opinions, and share experiences. However, the consultants said not to go beyond the scripted language in the presentations. Newman acknowledged that she and Pam Costello co-presented the power point and video presentations.[145]

Newman acknowledged that at the end of one of her issues and answers presentations, a lab tech employee, Emily Witty, was very interested in the pension plan and was concerned about delays and changes in the plan and asked several questions along those lines. According to Newman, she told Witty that she did not know the answers to her questions, but that the pension plan could be a part of bargaining.[146] Newman denied telling Witty or any employees in her presentations that they would, in all likelihood, lose the 401(k) plan if the Union were voted in or that it would not be implemented in July; or that the 401(k) plan was going to be rescinded, withdrawn, curtailed, or modified if the Union won the election. Newman stated that she did not, nor did her co-presenter, Costello,[147] say anything about the 401(k) plan in the context of the Union's

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[145] Newman also gave presentations with other management and supervisory personnel; Dennis Burkholder and Wendy Purcell-issues and answers; and Margo Dooner, the power point presentation.

[146] Newman stated that she referred to and read to the employees the issues and answers presentation pp. 24-27 dealing with benefits which, in pertinent part, states "in bargaining there are no guarantees, you may gain, lose or retain the same pay or benefits [p. 25] and if the UAW wins ... the hospital and union must bargain over wages, benefits and other conditions of employment [p. 27]."

[147] Costello testified at the hearing and corroborated Newman and specifically denied that either she or Newman told Witty that if the Union were selected, the 401(k) plan probably would not be implemented at all. Like Newman, Costello said she followed to the script in their presentations.

winning the election and, in fact, Witty was the only employee to inquire about a matter not included in the presentation materials.[148] When the Respondent's counsel presented Newman with Hyde's testimony (at Tr. 145, ll. 15-19), Newman stated that she did not make the statement that, with respect to the 401(k) plan, it probably would not start in July. Newman stated she was certain she made no such remarks because this statement would be considered threatening and, also, she had no idea what was going to happen to the 401(k) plan should the Union be voted in.[149]

Witty testified that although she was ineligible to vote in the April 2001 election, she nonetheless attended three hospital presentations, including ones where Newman and Costello made a power point and issues and answers presentations. Witty stated that she knew the 401(k) plan was supposed to be implemented in July 2001 and asked Newman what would happen to the 401(k) if the Union were voted in at the issues and answers presentation. According to Witty, Newman did not say the 401(k) probably would not be implemented in July if the Union came in. Witty stated she was sure Newman did not make this statement because Witty was fanatical about "financing." The 401(k) plan was important to her, and she was very concerned about it. Witty also stated that neither Newman nor any other manager at any other time said the 401(k) would probably not be implemented in July if the Union were voted in.[150]

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[148] Newman said that Witty also came to her office four or five times to ask questions of one sort or the other about the Union. For example, Witty inquired about what bargaining unit she would be in.

[149] Newman also denied Hyde's testimony (at Tr. 163, LL. 18-22), wherein Hyde said that Newman did not tell Witty that the 401(k) plan was a subject of bargaining and that Newman did not talk about bargaining at all.

[150] Witty is currently employed as a medical technologist and microbiologist at the Toledo Hospital's North Campus Laboratory where

Witty recalled that Newman told her, "[I]t [the 401(k) plan] would go through in July. However, once a union vote occurred, if the Union is voted in the Union would negotiate what the 401 would be. Because the Union would be bringing in a bargaining unit."[151] Witty stated once she was given this advice from Newman, she had no additional questions about the 401(k) and did not approach Newman with other concerns about the plan.

Paul Toth testified that he has been employed at the Toledo Hospital as a manager of operations, including the hospital's computer operations, for the past 3-1/2 years. Toth stated that he was aware of the Union's filing of petitions for elections at Promedica but that employees in his department were deemed ineligible to vote. Toth said he received training on what to say and not say about unions from the hospital's human resources department and labor relations consultants hired by the hospital.

Toth also related that prior to working at the hospital, he was employed at Eastern Michigan University which was unionized; he also had worked with Blue Cross of Toledo for a number of years and received intensive training there regarding the "dos and don'ts" in labor organizing drives.[152]

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she has been assigned for the past 4 years; Witty has worked for Promedica for a total of 25 years. Witty said she was informed of her ineligibility to vote after the union authorization cards were signed. Medical technologists were determined to be professional workers.

[151] On cross-examination, Witty claimed that these were Newman's "exact words."

[152] I note that Harris confirmed that in her version of Toth's conversation about the 401(k), he mentioned his employment background at East Michigan, his employment as a UAW worker, his interactions with the UAW and, specifically, his references to contacts, grievances, and bargaining over rules and regulations. (Tr. 673.)

Toth stated that he did not recall any conversation with Harris in the hallway after her shift. Toth noted that Harris' hours are 9:30 p.m. to 7 a.m., while his hours are 8 a.m. to 4:30 p.m. and, therefore, his contact with her generally is minimal. Toth also noted that Harris was a strong union supporter-she displayed union buttons on her computer console and he observed her passing out literature-and he did not want to discuss union activities or matters with her.

Toth recalled, however, one incidental conversation he had with Harris before the election that touched on the 401(k) plan. According to Toth, he and other employees had attended a hospital-sponsored issues and answers slide presentation and as he was leaving for the day, one of his employees, Jerry Liezekowski, said that if the Union were voted in, things would be tougher for the employees and by way of example the timeclocks and new rules would be established. Toth said he told Liezekowski that he could not answer that because those issues go to the bargaining table. However, based on his experience at Eastern, Michigan, timeclocks were never instituted.

Toth stated that at the time a number of other department employees, including Cathy Harris, were nearby and standing around talking. Toth said that he heard Harris say that the only reason the 401(k) was being implemented was because of the Union's efforts to have an election. Toth said that he responded, saying he did not think that was true because the 401(k) was being developed and that the hospital was simply looking for a provider and working on certain rules governing the operation of the plan. According to Toth, Harris simply walked away with no response.

Toth specifically denied saying that the employee would not have a 401(k) plan if they selected the Union. He noted that, in his mind, the 401(k) plan was going to be implemented irrespective of whether the Union was in or out, although the bargaining unit might change some rules or

regulations associated with the plan. Toth also denied ever asking Harris how it felt not to be able to vote in the election.

Discussion and Conclusions of the 401(k) Allegations

The Respondent, stressing that the presenters were all given advance training about what was permissible in the conduct of the presentations, and adhering to the scripts, argues that Newman did not violate the Act or commit objectionable conduct. The Respondent contends that Section 8(c) allows employer representatives to express their views and opinions as long as the expressions contain no threats of reprisal, force, or promise of benefit. The Respondent submits that Newman credibly denied making any threatening remarks about the 401(k) and, lawfully, only informed the employees that the 401(k) may be a subject of collective bargaining. The Respondent notes that principal 401(k) questioner, Witty, corroborated Newman's denial of threats of loss of the 401(k) if the Union were voted in and, in fact, contradicted Hyde who, the Respondent contends, was inconsistent, had poor memory, and generally was not a reliable witness.

The Respondent also argues the General Counsel has failed to carry its burden with respect to the allegations involving Toth. The Respondent, again stressing it manager's training and Toth's even more extensive experience with and training in union election matters, asserts that Toth was a highly credible witness and his denials of Harris' allegations should be credited. The Respondent submits that Toth's contact with Harris was not only minimal because of their respective schedules but because he chose to avoid her because he knew she was a strong union supporter. To the extent Toth spoke on the issue of the 401(k), the Respondent asserts he only responded to Harris' offhand remark by saying that he disagreed with her because the 401(k) was being developed before the Union's arrival. The Respondent submits that Harris was simply not a credible witness in her own right and presented an implausible story given Toth's

background, knowledge, and experience in labor election matters.

I would find and conclude that the General Counsel has not established the charges in question and, correspondingly, I would find and conclude that the Respondent did not engage in objectionable election conduct with regard to the 401(k) allegations.

I note first and foremost that these charges present credibility issues. I am not convinced that either Newman or Toth made the comments attributed to them by Hyde and Harris, respectively. In point of fact, it seems highly unlikely and even implausible given their training and experience, and the known fact that the 401(k) was going to be implemented in July 2001, that Newman and Toth would make any statements even suggesting that the 401(k) was in jeopardy because of the Union or the election. I also note that in the case of Newman, she credibly testified that she gave many presentations to gathered employees and, yet, the General Counsel produced only one witness to say she violated the Act. Notably, Witty, the employee whose questions about the 401(k) sits at the base of the charge against Newman and who was not called by the General Counsel as a witness, essentially refuted[153] Hyde's version of Newman's response to Witty's questions. I note also that even Hyde acknowledged that Newman never said the 401(k) would be canceled or withdrawn because of the Union. With respect to alleged remarks by Newman about the 401(k), the evidence is not insufficient in my view to warrant a finding of a violation of the Act. I would recommend dismissal of the charges.

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[153] I note that Witty gave something of a confused response at one point in her testimony about Newman's response to her question or questions about the 401(k) but, in essence, she claimed she was "fanatical" about the issue and at the end was satisfied that the 401(k) was not in jeopardy after hearing Newman's remarks.

In likewise, I am not persuaded that Toth, who appeared to me to be an intelligent and straightforward witness, would make such inflammatory statements to a person he knew to be a strong union supporter in the middle of a union election campaign. This was simply not credible and considering, as will be later seen, that Harris will be contradicted by a fellow worker with respect to other remarks she attributes to Toth, I do not believe Harris was completely truthful here.[154] Accordingly, I would find and conclude that the Respondent did not violate Section 8(a)(1) nor did it engage in objectionable election conduct. I would recommend also dismissal of this charge and overruling of Objections 5 and 10.

2. The allegations involving the creation of surveillance and threats of increased rules and regulations (Objection 23)

The complaint alleges that the Respondent, through Toth, created the impression of surveillance of its employees by telling an employee that the Respondent maintained a list of employees active in the Union.[155] Toth is also essentially accused of threatening employees with the imposition of more rules and regulations at the Toledo Hospital if they selected the Union as their collective-bargaining representative.[156]

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[154] I note that Harris' testimony was essentially uncorroborated, amounting to basically her word against Toth's. The General Counsel argues that because of her reluctance to testify in three unfair labor practices against her current supervisor, Harris' testimony should be seen as having a high degree of reliability. In my view, Harris is entitled to no more credibility than anyone else who testifies under oath. Furthermore, the Act protects her from retaliation because of her testimony in Board proceedings. Harris simply was not credible in my view.

[155] See par. 24 of the complaint.

[156] See par. 28 of the complaint.

Cathy Harris was again called by the General Counsel to establish these charges.

Harris stated that on one evening prior to the election, management convened a meeting at which the employees in her department were present. Harris stated that, afterwards, most (five to six) of the department employees were gathered in the computer room discussing the meeting when Toth casually mentioned before the group that if the Union gets in, he will have to have a different set of rules and regulations and those people who are not good workers would be protected by the Union.

Harris stated that in her conversation with Toth wherein he made remarks to her about the employees not getting a 401(k) plan if the Union were elected, she said, "Well, I heard there's a list going around kept by the hospital on which employees names are listed (including Harris' name). According to Harris, Toth responded, "yes" (there was such a list), but she should not worry about it, this was no big deal, that her job was fine, and there was nothing to worry about. According to Harris, Toth said the list contained names of employees active in the Union.

As with the 401(k) discussion, Harris said she and Toth were alone. According to Harris, Toth said that the list he referred to was not one of his making but the hospital's. Harris said she has never seen the list nor does she know where it is or was kept. However, she became aware of the list's existence from a coworker, Ray Goins.[157]

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[157] Goins testified at the hearing. Goins stated that he is a coworker of Harris in the computer center of Toledo Hospital. Goins denied telling Harris that the hospital kept a list of employees active with the Union; he was not aware of any such list and never heard his supervisor, Toth, speak of any such list. Goins said he spoke to Toth about the Union and, according to Goins, Toth was very neutral, gave him pros and cons of the Union, and was never threatening.

Toth acknowledged that he participated in a discussion with an employee, but not Harris, after an employer presentation in which rules and regulations and the Union were mentioned. He explained that, sometime in February or March 2001, six or seven of his employees and other employees attended a night-time hospital issues and answers presentation in the education center's room. Toth stated that he did not participate in the actual presentation but recalled one of his employees, Jeff Barker, asking questions about a retirement concern in the questions and answer session part of the meeting. Toth stated he could not answer the question and told Barker he would get back to him about the availability of retirement orientation classes for employees at the hospital so that he could educate himself on the issue.

Toth said the employees also asked him about the Union's being in place at other hospital and health care facilities. Toth said that he volunteered to research this at a later time with the hospital's consultants.

After the meeting, Toth said as he was about to leave, one of his employees, Jerry Liezekowski, asked him-rhetorically in Toth's view-if the Union were voted in, things would be tougher (for employees) at the hospital, that timeclocks and different sets of rules would be imposed. Toth said he told Liezekowski that he could not answer this because those matters are the subjects of bargaining. Toth said he told Liezekowski that during his 7 years at Eastern Michigan, timeclocks were never installed. Toth noted that at the time, five or six of the computer department employees, including Harris, were standing around talking.[158]

Toth specifically denied telling any employees that if the Union gets in, he will have to have a different set of rules and bad workers would be protected by the Union. Toth felt

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[158] Toth identified the employees. The employees were the same ones Harris identified as being on the scene at the time.

that this statement was silly because, in his view, no union or rules could protect unproductive workers. Also, he viewed the statement as something he simply would not say to employees or anyone else.

Regarding an employee list, Toth stated he knew of no such list, except that there was a voter eligibility list and his employees were not eligible to vote. Accordingly, Toth said he had no reason to keep any lists regarding the Union and the election. Toth specifically and strongly denied Harris' record testimony about the list of employees active in the Union allegedly kept by the hospital and his complicity in the matter, saying that, in his view, her testimony was fabricated.

Toth said that he had a good working relationship with Harris and his other employees and has never disciplined her or had cross words with her. In his mind, any conversations he had in her presence were friendly, nonheated, and informal.

Discussion of the Impression of Surveillance Charges

I would recommend dismissal of these charges. As I have indicated, I did not find Harris credible regarding her testimony about statements she attributed to Toth. As I earlier noted, Harris was contradicted by another employee regarding Toth's involvement with the Respondent's creation and maintenance of a list that could be used for surveillance purposes or would create the impression of surveillance of Harris' union activities. Toth, on these charges again, impressed me as a serious and honest person who would not make the statements attributed to him. I would find and conclude that Toth neither violated the Act nor engaged in objectionable conduct.

3. The allegations involving the Respondent's promise of wage increases, and statements rescinding promised wage increases during the election campaign (the catchall objection)

In paragraph 26 of the complaint, the Respondent is charged with promising employees wage increases by its admitted supervisor/agent, Gloria Florence, to dissuade them from supporting the Union. In paragraph 27, the Respondent, through two of its admitted supervisors and/or agents, Sean McClure and Francis Michael Walsh, are charged with telling employees that previously promised wage increases were being rescinded because the Union filed election petitions. The allegedly offending statements of Florence were made sometime in February 2001; the statements of McClure and Walsh were allegedly made sometime in March 2001.

a. Background of the wage increase allegations

I believe it would be helpful to recite by way of background a brief history of the Respondent's actions with respect to the wage increase issue.[159]

The Respondent's corporate mechanism for examining and authorizing compensation for hospital employees in all or most job classifications is the compensation committee, or counsel, which was established by Promedica's central region executive council in March 2000.

The compensation council addresses wage and other compensation issues brought to its attention by the various hospital department heads. In June 2000, there were about five or six compensation issues pending before the compensation council, including salary survey data dealing

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[159] The background of the wage increase matter is based largely on undisputed evidence and testimony credited by me on the relevant points. In this regard, I have specifically credited certain "background" testimony provided by the Respondent's management representatives Barbara Steele, president of Promedica's central region, Jeffrey Keller, corporate director of compensation, and Sean McClure, acting director for the Toledo Hospital Laboratory. The evidence adduced for substantive purposes will be discussed in a different section.

with the registered nurses (RNs), certain laboratory (lab) positions, mental health technicians, unit secretaries, and radiology and respiratory classifications. It was determined by the council at about that time that there were significant recruitment and retention issues in these job classifications, which, if not addressed, could lead to a lack of competitiveness and loss of patients.

The Respondent's management considered one of the lab positions, the preanalytical technicians (PTs), to have significant wage issues which resulted in unacceptably high turnover among these employees.[160] However, the PT wage issue was complicated and somewhat exacerbated by their being no permanent administrator in place in this department to deal with the issue. Therefore, there was a dearth of data to support a specific wage adjustment for these workers. However, the compensation council anticipated that an adjustment would ultimately be made and set aside a certain amount to be allocated to the PT classification. The PTs' wage issues, however, were not addressed in earnest by the council until around December 2000, some 5 to 6 months after the installation of an acting director for the clinical laboratory.[161]

Sean McClure became acting director of the Promedica clinical laboratory in May 2000. As acting director, McClure was responsible for the overall administration of the lab and supervised around 189-200 full-time and 50 part-time employees, including PTs who were located at the Toledo

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[160] Preanalytical techs are not technically trained employees and receive pay on the lower end of the hospitals' pay scale. These employees serve primarily a customer service function.

[161] The PTs were not given first tier priority for an adjustment because of the lack of developed data to support any adjustment. Because of the shortage of direct health care workers, the Respondent required 250 RNs, so this matter was given immediate attention by the Respondent in September 2000.

and Flower Hospitals and the North Campus Lab. One of McClure's first assignments was to deal with the wage and compensation issues associated with the various employee classifications at the lab with a view to assuring that Promedica lab employees received wages comparable to those being paid by other hospitals in the region and to maintain Promedica's competitiveness. McClure initiated the study of wages in the lab by identifying positions that were problematic. Over the course of several months, McClure identified two positions with wage problems, the PTs and support coordinators.[162]

Regarding the preanalytical techs, McClure, sometime in October 2000, communicated with Dr. Francis Walsh, the Medical Director of the Laboratory, and expressed a certain urgency about current PT wages and their high turnover rate and the difficulty the hospital was experiencing in filling PT vacancies at hospital facilities.[163]

Sometime in December 2000, McClure also prepared for the compensation council a formal request for market equity review in support of his recommendation that the PTs required a wage adjustment; this document was submitted to the council on December 18.[164] McClure also sent a memo to Jeff Keller, the chairman of the council; in which he supplemented the market equity review request with his

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[162] See R. Exh. 50, a document prepared by McClure in May or June 2000 to show comparatively the wages received by various lab employee classifications and identify problem areas with regard thereto.

[163] See R. Exh. 47, a memorandum to Dr. Walsh from McClure. This memorandum is dated May 30, 2001. However, the document was prepared in August but given to Walsh on October 24, 2000. The 2001 date was applied automatically by McClure's computer when he retrieved the document from his files. Dr. Walsh had requested a status report on the preanalytical tech situation to present to the hospital's president.

[164] See R. Exh. 48.

request for specific actions to address hiring and retention of the PTs.[165] This latter document was prepared by McClure to gain an audience with the council to discuss the matter.

McClure presented his case to the council sometime in January (around January 25) 2001, and the council agreed in principle with him that there was a market equity issue presented with the wages received by the PTs. However, McClure was asked to refine his report and return to the council in 2 weeks. In the interim, McClure corresponded with the council chairman, Keller, to iron out some differences in philosophy between McClure and the council vis a vis the PT raises.[166] Around February 14, 2001, McClure again met with the compensation council.

At this meeting, there was general agreement among the council members that the PT classification demanded some adjustments because of the recruitment and retention issues presented by McClure. However, there remained a concern about McClure's approach to resolving the wage discrepancy as compared to the market-based approach the council had employed in dealing with wage issues associated with the RNs. The council wanted McClure to follow that precedent and appointed Keller to work with him so that the needed adjustments could pass muster with Promedica's executive council (the ultimate corporate approving body) headed by President Barbara Steele.

McClure and Keller engaged in a number of conversations about the matter from about February 20-23, 2001, with Keller eventually telling McClure that his approach could

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[165] See R. Exh. 49. This document also reflects a May 30, 2001 date that is automatically supplied by McClure's computer when he retrieves it from his computer.

[166] McClure was wedded to the hospital's old merit performance-based pay system; the compensation council, however, had moved to a market equity approach to the wage issue.

not be sanctioned by the council and that if he insisted, the matter would have to go back to council because Keller could not take the proposal under McClure's approach to the executive council.[167] As of around February 20-23, 2001, the PT wage adjustment had not been received by the executive council for final approval for funding. Moreover, because McClure's existing budget was insufficient to fund the adjustment, it could not be implemented without the final approval.

In the meantime, however, the compensation council became aware of the filing of the election petition by the Union on about February 18, 2001. The council considered the election with the timing of the proposed wage increase and, while in agreement with the need therefor, decided that implementation would not be appropriate. The compensation council met with Steele's executive council sometime near the end of February or early March to discuss the wage issue; corporate legal staff participated in this meeting through a conference telephone arrangement. At this meeting, the executive council decided to approve the funding of the PT wage increase but not implement it in light of the election petitions. The PTs wage increase was not implemented until after the election and was in effect as of the hearing date.[168]

b. The substantive charges; the announcement of wage increases and the withholding of the increase

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[167] See R. Exh. 51, a series of e-mail correspondence between McClure and Keller regarding their respective approaches to the PTs' wage adjustment during the period covering February 20-23, 2001.

[168] The Respondent granted a general wage increase to all employees in 2001 and market wage adjustments had been given to coders, RNs, and pharmacists at the time the Respondent was considering the PTs' wage adjustments. The general wage increase and the wage adjustments are not in issue in the instant litigation.

The General Counsel called preanalytical technicians Sherrie Schreiner and Terri Lynn Dawson, and Lora Hyde to establish these charges.

Schreiner testified that she has worked at the Toledo Hospital for about 23 years and currently works the first shift, 6:30 a.m. to 3 p.m. in the central processing-microplating-section of the lab as a PT; her supervisors are Gloria Florence and Wendy Purcell.

Schreiner stated that sometime in February 2001, Florence came to the microplating area of the lab and informed her and a coworker that they were going to get a 15-percent pay increase effective on their second paycheck in March. Schreiner noted that Florence also went out to the main processing area and shared this news with employees there. According to Schreiner, Florence's statements generated much discussion among the employees. However, Schreiner conceded that Florence did not promise employees pay raises in order to dissuade them from supporting the Union and that, in fact, Florence made no mention of the Union at all.

Schreiner related that sometime in early March 2001, in a laboratory staff meeting, McClure announced in the main work area of the North Campus lab that on advice of he hospital's attorneys, the pay increase was not being granted at this time.[169] According to Schreiner, about 30 employees were in attendance at this meeting and the announcement was a hot topic of discussion among the workers.

Schreiner did not recall McClure's using the term "rescinded." According to Schreiner, McClure was the only

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[169] On cross-examination, Schreiner said that McClure said the central processing employees like herself would not be receiving their pay increase on the advice of the hospital's attorneys because of the upcoming union election, "because we had filed the petition and the upcoming union election." (Tr. 75.)

management representative who spoke about the wage increase.

Hyde testified that she attended a lab update meeting sometime in March 2001 in the chemistry area of the North Campus Lab, where Dr. Walsh told the 50 or so assembled workers that a petition had been filed by the Union with the Board. Hyde said that an employee asked whether the central processing unit was going to get a raise. Walsh responded, according to Hyde, that the hospital's lawyers had advised that because the petition was filed, central processing workers would not be getting the anticipated summer or fall raise, nor an upgrade in classification. Hyde testified that the employees at the meeting were from both the technical and support bargaining units and included some professional employees. According to Hyde, Walsh's comments about the raises were a topic of "constant" conversation among the employees. Hyde, for her part, recalled discussing this issue with Schreiner.

Dawson testified that she discussed the wage raises with McClure about 2-1/2 years ago, and McClure told her that she and her coworkers were going to get raises, that the supporting paperwork was complete but the raise amount had not been determined.[170]

Dawson said that she attended a quarterly lab date update in March 2001 called by Dr. Walsh. According to Dawson, around 40 to 50 persons attended the meeting where, among other lab business addressed, the subject of raises was raised by one of her coworkers who asked Walsh if he had any additional information as to when the raises would be implemented. Dawson stated that she could not recall

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[170] Dawson has been employed by the Toledo Hospital for around 10 years as a preanalytical technician. She works the first shift and is supervised by Gloria Florence. Dawson was an eligible voter in the support services unit.

Walsh's answer[171] because she had to leave the meeting. Dawson later asked Florence what Walsh had said about the raises. According to Dawson, Florence said that she was not sure but she thought the problem was that the hospital's lawyers were holding up the raises because of the union organizing effort, that the hospital attorneys were putting the raises on hold and no decisions had been made.[172] According to Dawson, Florence said she would have to check with Newman for a specific answer. Dawson later contacted Newman who told her that the matter was with the human resources department and that department would have to be consulted.

Dawson stated that the raise for the PTs was a hot and frequent topic of conversation among the lab employees and was brought up in several lab meetings between February and April 2001. According to Dawson, Florence, Purcell, and Newman would be routinely asked, "When are we going to get our wage [increase]," and the answer was always, "I don't know, [the matter is] still on hold" or that management was still checking on the matter.[173] Dawson also stated that

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[171] Dawson said because she was working and coming in and out of this meeting, she cannot recall whether Walsh or any management representative said anything about the wage issue, only that the issue was raised by a coworker whom she could not identify.

[172] The General Counsel requested that the complaint in par. 27 be amended to include Florence as an additional participant in the alleged unlawful rescission of the wage increases. I granted the amendment over the Respondent's objections.

[173] See Tr. 289. Dawson also said that she and other employees would even stop Newman in the halls or meet with her privately and ask about the status of the raises. Newman would say she had not heard anything. Dawson also intimated that she and her coworkers discussed the wage issue among themselves outside of the meetings and that in her discussions with McClure over a period of time, his main concern was excessive turnover in the lab and that higher pay was needed to retain workers.

no one from management ever said that the wage increase had been rescinded-only on hold.

McClure testified about his contacts with the employees during the period in which he was working with the compensation council to achieve the wage adjustments for the PTs.

McClure stated that after the second (February 15) meeting with the council, he had a conversation with his immediate supervisor at the time, Gary Gordon, who gave him permission to tell the PTs that the wage increase was being approved.[174] After speaking with Gordon, on about February 21, he met with Gloria Florence and Wendy Purcell, technical coordinator for lab processing and supervisor of the central processing at the North Campus Laboratory, respectively, and instructed them to tell the PTs that the wage increases had been approved.

Florence[175] testified beginning around January 2001, there were discussions in her department about a potential wage increase for the PTs because of high turnover. Sometime in January 2001, Florence stated that she, along with her supervisor, Barbara Newman, and second shift coordinator, Wendy Purcell, attended a departmental

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[174] McClure stated that the market equity data used by him to support the wage increases were prepared by the Respondent's human resources department and provided to him by his then-bosses, Jim Jekaki and Sarah Polling, who suggested that he share the market equity materials with the workers, which he did. According to McClure, it was obvious to all that there was a problem with wages for the PTs and employees frequently would ask him what he was doing about it, to which he would reply that he was working on the matter.

[175] Florence has worked at the Toledo Hospital laboratory for almost 20 years. She supervises about 38 workers who process lab specimens sent to the North Campus Lab. Florence reports to Barbara Newman and is assigned to the first shift but is responsible for all shifts. I would find and conclude that Florence is a supervisor within the meaning of the Act.

meeting with the lab employees. Florence stated that either she or Purcell told the gathered employees, including the PTs, that the hospital was still working on the wage increases. According to Florence, some employees asked additional questions about the raise, but were simply told that the matter was being worked on.

Florence said that after this meeting, sometime in late January or early February, McClure informed her and Purcell that he had just come from a meeting and that the raises were definitely going to take place. Florence then asked McClure whether the staff could be told about the increases. According to Florence, McClure said that while he did not have additional information other than the increases were still being worked on, she could report to the staff that the raises were definitely happening.

Florence stated that, armed with this good news, she and Purcell called a brief meeting with about 10 to 15 workers in the central area of the lab and told them that wage increase was definitely happening. Florence said that she and Purcell also went to other areas of the lab and informed other workers who could not attend the impromptu meeting. Florence recalled telling a PT in the microplating area of the lab, Schreiner, about the proposed increases. According to Florence, she told Schreiner and the others she happened upon that the raises were definitely happening but she did not know any specific details such as a time frame for the increases, that these points were still being worked out.

Florence said that the matter of PT wage increases was also raised in the Wednesday, February 21, departmental meeting with about 10 to 15 employees by one of the employees. Florence stated that either she or Purcell told the employees that the details of the increases were still being worked on but she had no additional information to impart. According to Florence, the employees became very angry so much so that she and Purcell called Newman in to reassure them that they were going to receive the increases. Newman

addressed the employees essentially repeating what Florence and Purcell had told them earlier.[176] The employees appeared mollified by the remarks coming from an upper management person.

Florence stated that a couple of days after this meeting (on Friday), Newman gave her and Purcell the bad news. Newman told them that because of a pending petition for an election by the Union, the raises were to be put on hold because of some legal issues with the Union. Newman asked them to give this news to the employees. Florence said that she and Purcell told Newman they could not do that; they did not want to face the employees. Accordingly, Florence, Purcell, and Newman gathered some employees from the first and second shift for an impromptu meeting in the central processing area of the lab. Florence stated that Newman told the employees that pending the election petition filed by the Union, the wage increases were being put on hold, that some legal issues had to be worked out.

Florence stated that because of the employees' (negative) reaction at the Wednesday meeting, she was very upset over the latest news. According to Florence, she and Purcell said nothing. Florence stated that she "zoned out" and could not recall everything Newman said, except that the increases were on hold. Florence specifically denied that she ever said that the wage increase for the PTs was being rescinded, withdrawn, canceled, or killed; she also denied hearing Purcell, Newman, McClure, or anyone in management say that the wage increases were being rescinded or not going forward because the Union had filed election petitions. Florence stated that in her mind that the increases were going

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[176] Florence, consistent with her stated practice, prepared notes of the meeting (see R. Exh. 46) in which she mentions that the "Raises are coming ... unable to give you all the details. Sean [McClure] is working on this right now."

to go through eventually as planned, and, indeed, they were implemented in September 2001.

Florence also denied at any time making any statements to the effect that the employees would get the PTs pay increases if they decided not to vote for the Union. Florence stated she never tied the employees' support or lack of support for the Union with the pay adjustment issue.

Newman testified that she was told of the proposed wage increase for the PTs by McClure in January 2001. Newman confirmed that the affected employees were told that an increase was in the works and had been approved in a departmental meeting convened by Florence and Purcell. Newman confirmed that she was called into this meeting by Florence and Purcell because the employees were anxious to receive the increase and asked questions about the status of the raise. Newman said she told the employees that the wage increase entailed a lengthy process and that they needed to be patient.

Newman confirmed that she directly or through McClure received word from either human resources or the compensation council that the wage increase was on hold. McClure, according to Newman, told her in late February that the increase was on hold until the election was completed; that management did not want the increase to be a factor in the election, or to be perceived as an attempt to sway the vote. Newman stated that she then convened the employees and told them that the wage increase was on hold; Purcell and Florence were present at the meeting.[177]

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[177] Purcell testified at the hearing about the wage increase issue and essentially corroborated Florence and Newman's account of the meetings with the PTs in which the issue was raised and discussed. Purcell also confirmed that at the meeting after the February 21 meeting, she and Florence did not speak at all; Newman did all of the talking and told the employees that the raise would be put on hold to prevent a perception that the hospital was committing an unfair labor practice. According to

Newman denied ever saying that the pay increase was being rescinded, canceled, modified, or totally put off subject to any negotiations with the Union; the Union was not blamed in any way. Newman stated that she never heard anyone in management say that the pay adjustment would be rescinded, withdrawn, or canceled because of the Union's presence.

McClure also testified to his actions after receiving notice that the PTs' raise was on hold.

McClure stated that about 2 days after permitting, Florence had Purcell to announce the approval of the wage increase to the PTs, the Union filed an election petition, which event "sent him scrambling" to seek advice from the hospital's legal department. McClure stated that he was told that the election would take place within a couple of months and that to implement the increase would make it appear that the hospital was trying to buy votes; therefore, the increase could not go forward under these circumstances.

McClure said he was asked by employees about the raise and he told them the matter was with the attorneys and that he was not sure what would happen. McClure denied ever telling employees in the lab or the hospital that the proposed wage adjustment was dead or "rescinded." McClure said that he was determined to push for the wage increase irrespective of the Union because he felt that the financial well being of the lab depended on a wage increase. McClure said the raise was simply put on hold and was in no way dependent on the outcome of the election or on negotiations with the Union.

Purcell, Newman did not use terms such as rescinded, withdrawn, killed, curtailed, and did not blame the Union for the wages being put on hold. Purcell said that after Newman's announcement, she was routinely asked by employees about the status of the raise and simply told them the raise was approved but could not be implemented.

McClure averred that he never received any instructions from management that the wage adjustment was contingent upon the Union's success or failure in the election.

McClure acknowledged that he attended a "state of the lab" meeting convened by Walsh in March 2001, but that he did not speak to the gathered employees. McClure recalled that Walsh was asked about the wage increase by some of the employees and he addressed their concerns.

Walsh[178] testified that he convened the first of his regularly quarterly meetings for 2001 with the North Campus lab employees on March 19 at around 10:30 a.m. Walsh stated that, among other matters, the PT wage increase was discussed at this meeting. According to Walsh, he told the employees that he was aware that a market adjustment of PT wages was necessary and had actually been approved in principle by the hospital. Walsh went on to say that because of Board rules, no raises could be implemented at that time;[179] that upon completion of the organizing campaign, irrespective of whether the Union is accepted or rejected, the raise could be brought up again either to be implemented or to be a part of the collective-bargaining process.

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[178] Walsh, a medical doctor, stated that he has been technically legally employed by the Toledo Hospital as an independent contractor for the past 13 years. According to Walsh, as the hospital's medical director, he is charged with setting the strategic direction of the clinical laboratories of the Toledo Health System. Walsh states he possesses no hiring or firing authority regarding the hospital's laboratory employees and no general management control over them. However, he does have oversight authority in terms of these employees' performance of the laboratory tests for quality control purposes. Walsh is an admitted agent of the Respondent within the meaning of the Act.

[179] By March 19, Walsh said that he was aware that an election petition had been filed by the Union.

Walsh adamantly denied saying that the pay adjustment would be rescinded, killed, modified, not pursued, or anything to that effect; but that the adjustment had to be placed on hold based on the "rules of the game." Walsh said he never placed any blame on the Union for the placing of the raise on hold and, in fact, told the employees that whatever happened in the election, the lab needed to go forward, to function as a clinical lab with a responsibility to patients.[180] He urged these employees to make their own decision in the election.

Walsh specifically denied the complaint allegations accusing him of saying that the wage increase would be rescinded, saying that, first, he would not say something he personally viewed as inflammatory; and, second, his familiarity with Board rules and regulations would preclude his making remarks which could be construed as antiunion or disruptive to what he knows are the rules associated with an organizing campaign.[181]

The Respondent also called Bonnie Veronica Rashleigh and Mary Ann Achter to rebut the charges against Walsh and McClure.

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[180] McClure essentially corroborated Walsh on these points.

[181] Walsh stated that through his prior experience with a unionized medical laboratory in New York City, his master's degree in business administration, and other experience in the commercial laboratory and venture capital business, he was very familiar with Board rules and regulations dealing with unions. Walsh also said he believed he was counseled by corporate counsel about dos' and don'ts' conduct in an election context prior to the March 19 meeting, and the counseling specifically included avoidance of language that suggested an inducement to the employees to vote against the Union. Walsh conceded that he was not familiar with all Board decisions regarding the granting or withholding of wage increases in an election context.

Rashleigh,[182] a medical technologist employed by Promedica for about 20 years, testified that she attended the March 2001 state of the lab meeting convened by Walsh. According to Rashleigh, the wage increase for the PTs was raised by an employee; that Walsh did not broach the subject in his opening remarks.

According to Rashleigh, Walsh said that the raise had been "put into progress" but it was currently on hold because under labor law, the raise could have been viewed as an incentive, bribery, or impropriety if implemented after the "Union business" began.

Rashleigh said the meeting lasted about 45 minutes but she could not recall McClure's speaking about the wage increase. She could not recall anything being said about the raises being canceled or withdrawn, just put on hold.

Achter identified herself as a 5-year laboratory marketing coordinator with no supervisory authority.[183] Achter stated that she attended the March 19, 2001 quarterly lab meeting conducted by Walsh at the North Campus Lab.

According to Achter, Walsh opened the meeting and spoke about the PT raise, saying that the raises were going to have to be put on hold until the vote was completed because if the raise were implemented, this could be viewed as an enticement.[184] According to Achter, Walsh said that he did not care which way the lab workers voted, as long as they

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[182] Rashleigh was not eligible to vote in the election.

[183] Achter stated she is a salaried employee and was not eligible to vote in the election.

[184] Achter believes the raise issue came up in the beginning or middle of the meeting but did not think any employee asked a question broaching the subject. However, she said that Walsh usually does answer questions from employees at these meetings.

voted. Achter said that Walsh did not say the raise was being rescinded or canceled, merely that it was being put on hold.

Achter said the meeting lasted about 30 to 45 minutes, but she could not recall McClure, who was in attendance, speaking about the pay issue at all.

Discussion and Conclusions of the Pay Increase Allegations

The General Counsel (and Charging Party) argues principally that the Respondent departed from its own procedure governing pay matters, i.e., getting final approval from the executive committee before announcing the pay increases for the PTs and then withholding the raise and blaming the Union and the election process. That in handling the pay increases in its own chosen fashion, the Respondent interfered with its employees' rights under the Act and, because of the timing of its announcement and withdrawal of the pay increase after the petitions were filed and during the election period, engaged in objectionable election conduct.

The General Counsel further submits that the only reason that the PT wage increases, which for all practical purposes were approved for funding by the Respondent's executive council in late February or early March, were not implemented was because of the Union's having filed petitions and the campaign that followed. The General Counsel contends that Board law is clear that an employer must proceed with wage increases as it would have had the Union not been conducting its campaign. That it is no defense that the employer informs employees that it wanted to avoid the appearance of attempting to influence the election and is putting the increase on hold as a consequence.

The Respondent acknowledged that under most circumstances, an employer has the duty to act as though a petition has not been filed and may (should) proceed to grant wages or other benefit adjustments to its employees; that it is to act as it would if the Union were not on the scene. The Respondent, however, contends that its actions here fall

within the Board-recognized exception to the general rule, which permits an employer to withhold expected wage increases provided that the employees are truthfully told that the increase has been merely postponed or deferred only to avoid the appearance of interfering with the election. The Respondent submits that, consistent with Board authority, it did not place the onus of the postponement on the Union and made it clear to the employees that the adjustment would occur whether they selected the Union or not. The Respondent contends that its actions and statements to its employees about the postponement of the PT wage increase complied with these recognized Board principles.

The Respondent also contends that the General Counsel failed to move the charge that Florence *promised* employees they would receive wages in order to *dissuade them from supporting the Union.* The Respondent concedes that Florence notified the PTs in late January or early February and on February 21 that the pay raises were forthcoming but her announcement was premature because of miscommunication and misunderstanding by the laboratory management. Moreover, the Respondent submits that, irrespective of these miscues, Florence's announcement never mentioned the Union and, in fact, had nothing to do with the Union. The Respondent submits this charge should be dismissed.

It should be noted that the General Counsel, in his brief, devoted considerable space to the discussion of McClure's, Walsh's, and, pursuant to an in-hearing amendment of paragraph 27, Florence's action vis-a-vis the pay increase issue. However, neither the General Counsel nor the Charging Party in her brief discusses Florence's alleged promise of the wage increases to the PTs to dissuade them from supporting the Union.

If there is one certainty regarding the PT wage increases, the Respondent fully intended to implement them, and these plans were in place long before the advent of the union

campaign. The credible testimony of the Respondent's manager, particularly that of McClure, leads me inescapably to that conclusion. The primary issue is whether the Respondent's actions, which ultimately lead to the announcements that the wage increases were being put on hold pending the completion of the election to avoid an appearance of interference, constitutes, nonetheless, an unreasonable interference with the employees' Section 7 rights. Secondly, if so, the issue becomes whether the announcement of the increases and then their withholding constitute objectionable election conduct.

The Respondent argues that once the petitions' filing was known, its response was clear and consistent-that is, the wage increases had to be put on hold to avoid the appearance of trying to influence the employees' election choices. This position misses by a wide margin a salient point, mainly that the Respondent, by its own actions, had created in the minds of employees that the raise-a fairly substantial one at that-was in the bag. I note that PT Schreiner credibly testified that Florence told her that the PTs were going to get a 15-percent raise that they would see on their second paycheck in March, news Schreiner shared with other workers. Thus, it seems clear that the Respondent created great anticipation in the minds of the PTs of a raise. Moreover, clearly under extant Board law, the Respondent could have lawfully implemented the raise, a point conceded by the General Counsel.

However, the Respondent took the course now in controversy and the upshot was predictable-the employees, once notified that they were not getting the raise by Florence, Purcell, and Newman, were disappointed and angry. Certainly, after all of the buildup about the raise by the Respondent, this result was not unexpected. Florence and Purcell were aware of this and did not even want to confront the employees with this backpedaling on the raises.

I would agree with the Respondent that it, through Walsh, tried to explain the hospital's reasoning and I do not doubt

that its efforts were undertaken in good faith and after careful consideration of the applicable law. However, in the minds of the employees, the damage was done, and I believe that they could reasonably conclude they now were not getting their promised wages because of the *Union's* filing of the election petitions. Furthermore, based on Walsh's statements that the wage increases would be subject to collective-bargaining negotiations should the Union win, there was no guarantee that the wage increase would be implemented. In fact, in my view, Walsh's statements could be interpreted by employees to mean that implementation of the increases would be vouchsafed by a union loss. In any event, contrary to the arguments of the Respondent and in spite of its attempts to not interfere with the employees' free choice, I would find and conclude that by announcing the withholding of PT pay increases after the filing of the petition and the commencement of the Union's campaign, it violated the Act.[185]

Turning to the issue of the election objection issue, the Respondent argues that even if an unfair labor practice charge is determined and its election conduct deemed objectionable, overturning the election results of the support services unit is not warranted. I disagree. Contrary to the Respondent, I cannot conclude that its conduct produced only a de minimis effect on the support services unit employees, either in the terms of numbers of workers affected or possibly influenced by the Respondent's postponing of the PT wage increase.

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[185] My finding here is based not on the Respondent's having rescinded the wage increase as charged in the complaint, but on its putting the wage increase on hold because of the Union's filing of the election petitions. I also note that I have carefully considered the Respondent's cited authorities and found them factually distinguishable from facts found herein.

Matters affecting pay are of high importance to all employees and any attempt on my part to determine the reach of and effect on any and all employees who may have received word that the PT pay increases were being put on hold because of the Union would involve extreme speculation. Surely, it is reasonable for employees other than the PTs in the proposed units to conclude that their prospects for pay increases could be adversely affected by the Union's filing petitions. Therefore, I would conclude that, although the postponement of wage increases directly affected only the PT job classification within the support services unit, the objectionable conduct as determined by me was potentially poisonous to the other job classifications and warrants setting aside the election results in that unit, as well as the technical unit; and that new elections should be ordered.

Regarding the issue of Florence's alleged promise of wage increases to employees to dissuade them from supporting the Union, I would find and conclude that Florence on this record made no such *promises* to the employees as I would construe the term. Any representations she made to the employees were more in the way of announcements of wage increases she was cleared to make. She was essentially for a time the bearer of good news and, of course, later, bad news. Florence was clearly a credible witness and her demeanor on the witness stand evinced her concern was for the employees who were being whipsawed on the wage issue. Florence's denied, and I credit her denial, that she ever mentioned the Union when she announced to the workers that they were going to receive an increase. I would recommend dismissal of these charges.

N. The alleged Interrogation of Employees by Nancy Konopka

In paragraph 23, the Respondent is charged with violating the Act through the alleged interrogation of its employees by Hospital Food Supervisor Nancy Konopka.[186]

The General Counsel called employee Diane Flanagan, a dietary worker at the Toledo Hospital, to establish this charge.

Flanagan testified that she began working at the hospital around January 24, 2001, and has worked both the day and night shift during her tenure. Flanagan stated that her day shift immediate supervisor was Nancy Konopka.

Flanagan related a conversation she had with Konopka a few weeks before the union election at around 9:30 a.m., while she was working the day shift. According to Flanagan, as she was going on break on the day in question, Konopka asked her about her reaction to the Union. Flanagan said she told Konopka that she was "idle" on the Union. Konopka then volunteered that she could not understand why the employees would want a union, what with all the benefits including the 401(k) the hospital provided. Flanagan said that she told Konopka that she was unsure (about the Union) because she had been employed at that point only about 2 months. Flanagan said she had no other conversation with Konopka and, since October 2001, has been working solely on the night shift supervised by another manager. Accordingly, Flanagan said she has not seen Konopka very often but when she sees her, she still speaks to her and, in fact, has a good working relationship with her.

Flanagan stated that she did not feel threatened by Konopka and viewed the conversation as friendly and

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[186] Konopka did not testify at the hearing; no reason was offered for her non-appearance by the Respondent. However, in their brief, the Respondent contends that the Union and the General Counsel failed in their burden of proof. Hence, the Respondent was not required to call Konopka as a witness.

nonthreatening. Flanagan said that she informed one employee of the conversation with Konopka.

Flanagan acknowledged that she was not a voluntary witness at the hearing[187] but denied that there were any improper influences by management regarding her testimony.

Flanagan stated that she also wore a union button during the campaign but no one from management interfered with her or told her not to wear the button; other employees in her department also regularly and openly wore union buttons.[188]

Flanagan said that Konopka never asked her how she was going to vote or told her she had to vote for the hospital. According to Flanagan, her conversation with Konopka was friendly and nonthreatening and that after the conversation with Konopka, she remained undecided about the Union. Flanagan said she did not feel that she was being spied on or surveiled and, in fact, the dietary employees, including herself, were very open about how they felt about the Union.[189]

Discussion of the Konopka Allegation

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[187] Flanagan was subpoenaed by the General Counsel to testify at the hearing. However, her appearance was compelled by order of the Federal District Court in Toledo.

[188] Flanagan did not indicate if she was wearing the button when Konopka approached her.

[189] In the course of her testimony, Flanagan related a conversation she had with her night-shift supervisor, Jim Kasperzack, who, she said, thanked her for voting no to the Union and should not to listen to other persons who talked about the Union. Flanagan said she did not feel that Kasperzack was attempting to interrogate or influence her. Flanagan acknowledged that she initiated some of the discussions with him about employees talking to her about the Union. This conversation is not charged in the complaint.

As noted, the Respondent did not produce Konopka, so Flanagan's testimony serves as the only testimony of the encounter. I found Flanagan's testimony to be generally sincere and forthright, and free of acrimony toward Konopka. I would credit her testimony.

The Respondent admits that Konopka was a daytime supervisor in the dietary department and concedes that she did ask Flanagan one question about her "reaction on the Union" and, as the conversation continued, Konopka mentioned positive aspects of working for the hospital, questioning any employee's support of the Union under such circumstances.

The Respondent submits that under the total circumstances, Konopka did not unlawfully interrogate Flanagan because, as admitted by Flanagan, the conversation was free of restraint, coercion, or interference with Flanagan's "idle" feelings for the Union or any other rights she enjoys as an employee. The Respondent notes that the conversation, as attested by Flanagan, was friendly and relaxed, that Konopka did not press Flanagan after she said she was idle on the Union. Moreover, the conversation took place in an open area of the cafeteria where other employees were openly and without interference expressing their support for the Union and engaging in union activities.

I would agree with the Respondent. Contrary to the General Counsel who submits that the questioning of Flanagan was highly coercive, I believe Flanagan's conversation was more in the nature of an amicable chat between a supervisor and an employee about the Union. Konopka felt that the hospital already provided good benefits and the Union was unnecessary. Flanagan on board only 2 months was unsure about the Union at that time although she at some time during the campaign wore a union button. Konopka certainly is free to express her opinion under the Act.

I cannot find and conclude that Konopka unlawfully interrogated Flanagan under the totality of circumstances test. I also do not believe that this singular innocuous conversation constitutes objectionable conduct. I would recommend dismissal of this aspect of the complaint and that the objection is not sustained.

O. The Allegations Involving Kerry Loe (Objection 23)

The complaint (as amended)[190] in paragraph 25(a) and (b) essentially charges the Respondent, through its patient care supervisor at Toledo Hospital, Kerry Loe, with violating the Act on two separate occasions-one sometime in March 2001 and another in September of that year. The March incident, as noted above, is cited as objectionable election conduct.

The General Counsel called Marjorie Smith, a licensed practical nurse working in the Toledo maternity department. Smith has worked for the hospital for 15 years and usually works the day shift but picks up extra hours working part-time on other shifts.

Smith testified that she was an active supporter of the Union from January through April 2001. During this time, Smith wore buttons and badges on its behalf and distributed union literature to her coworkers in the maternity unit. Smith

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[190] The General Counsel requested early on at the hearing that par. 25 of the complaint be amended to designate par. 25 as 25(a). He proposed that new language be inserted in the complaint as 25(b) as follows:

Some time during the first half of September 2001, the exact date being unknown, the Respondent, by its supervisor and agent, Kerry Loe, Patient Care Supervisor of Respondent's Toledo Hospital facility, made coercive statements to an employee concerning that employee's cooperation with the investigation of an unfair labor practice charge in violation of Sec. 8(a)(1) of the Act.

Respondent objected to the proposed amendment. I allowed the amendment, as the amendment was made early in what proved to be protracted litigation. Accordingly, I took the view that the Respondent would have ample opportunity to prepare its defense.

related a conversation[191] she had with her immediate supervisor, Loe, about a week before the election. Smith stated that on the day in question she was charting her patients at the nurses' desk when Loe asked to speak to her. According to Smith, Loe mistakenly thought she was upset over her current assignment or was simply having a bad day. Smith stated she told Loe that she was upset because of the recurring problems of staff shortages. At some point in this conversation, Loe presented Smith with a green card,[192] telling her she needed the card to vote and to have her identification with her at the polls. According to Smith, Loe said we encourage you to vote no for the Union. Smith responded that she was not interested in voting no-there was no way she would vote no. According to Smith, Loe then said if you really and truly feel that way, you should look for another job. According to Smith, the conversation basically ended after a time and without any apparent animosity.

Smith described the entire conversation as professional and casual, and that she had had no problems with Loe, who Smith conceded had previously disciplined her for absenteeism.[193] Smith said that she told her husband and

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[191] Smith could not give a precise date but thought that the conversation took place on Thursday or Friday of the week before the election in April at around 2 p.m., near the end of her shift in an empty nursery, where she and Loe sat in the baby rockers and talked. The conversation lasted about 15-20 minutes and covered not only staffing issues but also patient medical conditions and the staff expected for the next shift.

[192] Smith held the green card while she was testifying, but it was not adduced as evidence by the General Counsel. However, Smith read from the card which, among other things, said "Get out the vote, vote no," and referred to the Board's conducting a secret-ballot election. (Tr. 313-314.)

[193] Smith said that in spite of the discipline proposed by Loe, she had a positive relationship with Loe and did not take the discipline personally. Loe said that she has had no other disciplinary issues at the hospital and also currently works with Loe on the unit newsletter.

several prounion co-workers (five to six) about this conversation because she was astonished that Loe would make such a statement to her.

Smith also stated that she had a second conversation with Loe around Labor Day 2001, between 10 a.m. and 12 noon. Smith stated that on that day (she could not be precise), she went to Loe's office to check the sign-up book for extra hours and encountered Loe there. According to Smith, Loe said that she was upset with Smith regarding a conversation between the two; Loe said that she was upset that Smith had repeated a conversation they had had. Smith stated that at the time she brushed off Loe's comments, not knowing how to respond, and left the office. However, Smith said that she felt very uncomfortable and nervous in the aftermath because she previously had given "sworn testimony" to the Board after the election and she did not know whether Loe had knowledge of the written statement she had provided.[194] Smith stated she was concerned because she was alone with Loe when Loe made the comment, but Loe never explained to her what she was upset about. According to Smith, she assumed that Loe was upset about the conversation they had when Loe presented her with the green card and made the comments about looking for another job.

Kerry Loe[195] was called by the Respondent and testified that she recalled a conversation with Smith around March 3, 2001. Loe explained that she had heard that Smith was upset

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[194] Smith stated that she was subpoenaed to testify at the hearing and was "not very excited" about appearing because Cindy Miller, an active unionist who also recruited her to the union cause, had recently been discharged. Smith said she did not tell anyone at the hospital about her appearance at the hearing; she reported sick on the day of her appearance. Smith conceded that no one from management had spoken to her about her testimony.

[195] Loe has been employed by the Respondent for about 10 years and is an admitted supervisor.

and assumed that the problem stemmed from Smith's being pulled from her regular assignment in the postpartum unit to the antepartum unit in the north end of the hospital. Loe stated that Smith and she met in the nursery in the north end. According to Loe, Smith appearing very agitated and angry, said that she was tired of being overworked and understaffed, and felt she could not provide the proper level of care needed by her patients. Loe said that the two were sitting in the nursery rockers at the time and she allowed Smith to ventilate for a couple of minutes.

According to Loe, Smith said if they had a union, things like this would not happen. Loe said she responded by saying that there were nursing shortages everywhere and that she could not understand how a union could increase staff. Loe stated that she believed that other matters were discussed, but nothing more about the Union. Moreover, Loe felt that Smith seemed mollified by having her complaints heard because the conversation ended with Smith's returning to her job seemingly more relaxed. Loe stated that no other union-related issues came up between Smith and her that day. Loe denied telling Smith that if she did not like working at the hospital, she ought to work elsewhere, or any words to that effect. Smith said she would never say that to her employees.[196] Loe described her nursery conversation with Smith as nice and free of animosity.

Loe stated that Smith was a good nurse and one whom she would not want to lose, especially with the current shortage of nurses. Loe also denied ever giving Smith any literature or materials related to the union election. Loe acknowledged that she knew that Smith was prounion, having seen her wearing badges and seated at the union tables during the

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[196] Loe was presented with Smith's record testimony (Tr. 313) regarding the nursery exchange and denied the statements attributed to her by Smith.

election. However, Loe denied having knowledge of Smith's having spoken to Board attorneys and agents or given any sworn statements to the Board; Loe said that she did not know Smith was to be a witness in the current proceedings.

Loe admitted that she passed out green cards, usually at the nursing station at the beginning or ending of the shift and not in the middle of the shift when patients are receiving care. Loe stated that union cards may have said, "We encourage you to vote no," but could not recall whether this statement appeared on the card.[197]

Loe could not recall having any conversation with Smith in the fall of 2001 regarding Loe's being upset over Smith's having repeated a conversation between them or the conversation's connection to any written statement Smith may have given to the Board.

Loe further explained that actually she and Smith do not regularly see each other unless Smith is working extra hours, although there are times Smith may have occasionally come to her office. However, Loe denied having any conversations with Smith about this case.[198]

Loe acknowledged that she participated in three or four employer presentations during the election period, mostly at night between 2 and 3 a.m., but did not discuss the Union

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[197] Loe stated she was instructed (by management) to give the green cards to employees and gave them to about 60 people. She could not specifically recall giving a card to Smith but may have. She could not recall the names of all of these employees. Loe confirmed that the cards included the person's name, the bargaining unit, and times and places to vote. Smith said she was not sure whether employees would need the green card and personal identification to vote but she did not want employees to be denied a voting opportunity. So she told them to bring the card to the election sites. Loe identified R. Exh. 44 as a copy of the card she distributed.

[198] Loe stated that she only became aware of the Board complaint against the hospital through the local newspapers.

with any employees. According to Loe, the presentations were given by the hospital to answer questions employees may have about the Union and, in her view, were to show two sides of the issue. Loe said that she did not know if the purpose of the presentations was to induce employees to vote no.

Here again, the resolution of these allegations redounds to resolving the credibility issues between the two employees here. In that regard, I found Smith's testimony to be highly credible. Her demeanor was serious and earnest, and she clearly harbored no animosity toward Loe. Moreover, her testimony was corroborated by her possession of the green card Loe gave her and which Loe could not remember giving Smith. Smith also was consistent in her responses on cross-examination.

On the other hand, Loe did not have similar recall and, in fact, struck me as a witness hiding behind memory loss or lapse. Loe also did not seem forthright in areas where she should have. For instance, Loe admitted she said that the Union could not help with staff shortages but then said she said nothing adverse to the Union. Loe admitted that she participated in the hospital presentations but did not know if the presentations were designed to encourage employees to vote no. Then, too, Loe admitted she gave out 60 green cards which clearly exhort employees to vote no. I viewed Loe's testimony as somewhat disingenuous. Considering that Smith is a current employee testifying against a person who acts as her immediate supervisor and expressed fear of retaliation, I would on this score also credit her testimony that Loe invited her to quit and find work elsewhere in response to Smith's expression of support for the Union.[199] I

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[199] The Respondent urges a contrary finding, contending that it is implausible that Loe, who had received the labor consultant training, would discard everything she learned and threaten Smith. This is a very valid point. However, I believe that Loe made the remarks, perhaps in

would therefore find and conclude that Loe's remarks were in context coercive and interfered with Smith's Section 7 employee rights in violation of the Act.

The question next becomes whether the election results for the technical unit should be set aside because of Loe's remarks, which Smith credibly said she communicated out of astonishment to around five to six close prounion workers.

The Respondent argues that the technical unit is comprised of 550 or more employees and Smith did not identify the job positions these people held or their proposed bargaining unit, or even if they were eligible voters.

I would agree with the Respondent and conclude that this singular violation, by a supervisor in a one-on-one conversation with an employee, does not warrant setting aside the election where the remarks were disseminated to only a relative few employees whose bargaining unit affiliation and voter eligibility are unknown. I would recommend overruling Objection 23 as it applies to the technical unit. *Bonanza Aluminum Corp.*, 300 NLRB 584 (1990).

P. The Allegations Involving the Respondent's Threat of More Restrictive Leave Policies and Discharge for Striking (Objection 10)

In paragraph 22, the complaint alleges that the Respondent, through admitted Supervisors Pamela Costello and Barbara Newman, during a period covering February 14 through April 2001, threatened employees with more restrictive employee leave policies if they voted for the Union; paragraph 29 charges Costello with threatening

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spite of her training. I note that Smith was very concerned about Miller's discharge, considering that Miller recruited her to the union cause. I believe Smith's credibility here was enhanced under these circumstances.

employees sometime in March 2001 with discharge if they should go on strike.

Terri Lynn Dawson testified regarding the charges relating to the imposition of more restrictive leave policies.

Dawson stated that she attended approximately three of the employer-sponsored campaign meetings at which Newman and Hematology Supervisor Costello made presentations on behalf of the Respondent. According to Dawson, at the meetings, both Costello and Newman made oral presentations that covered a number of topics, including the current leave policy and a possible leave policy should the Union be voted in.[200]

Dawson stated that one or the other of the two presenters said that laboratory employees currently did not have to give 6 weeks' notice to take time off; but that would change should the Union be selected; that the Union would create havoc within the department and tear it apart.[201]

Dawson said that prior to the election, the employees had a very flexible leave policy. For instance, an employee could get her own coverage and take leave as needed for a doctor's appointment, school meetings, and the like. According to Dawson, Costello and Newman said this would change and that employees would need to obtain permission to take time off or be reprimanded. Dawson noted that both Costello and/or Newman appeared to be reading from a script.

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[200] Dawson said that the other topics included dues, voting eligibility, and cross-training.

[201] Dawson said that one or both Newman and Costello made these statements during question and answer sessions and backed each other up (taking turns) when talking about leave policies. However, Dawson says she clearly remembers Costello saying in the second meeting she attended that the employees would not be able to take time off as flexibly as under the current system. Dawson could not recall what Newman may have specifically said.

Dawson stated she viewed the hospital's current leave policy as an important benefit and that her coworkers shared this view. Dawson said she spoke to her fellow workers outside of the meeting about what she had heard regarding the possible change in the leave policy and recalled that this was a "hot" topic of discussion among the workers. According to Dawson, these comments about what she viewed as a more restrictive leave policy were raised in all of the meetings.[202]

Dawson also stated that neither Costello nor Newman indicated in the meetings that the leave policy was (or would be) a subject of collective bargaining if the Union were voted in.[203] According to Dawson, this was confusing to the employees because many thought it would be a collective-bargaining issue and something they had to deal with if the Union came in.

Regarding the 6 weeks' notice issue, Dawson said that Costello and Newman mentioned an existing collective-bargaining agreement between the Union and St. Vincent's Hospital which evidently required 6 weeks' advance notice. Dawson recalled a paper being passed around by the attendees but she did not know whether the paper related to St. Vincent's or what the paper included because she had to leave that meeting for work.[204]

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[202] Dawson noted that at the interdepartmental meetings, there were 20-30 people from the support unit; and at the last update meetings, there were technical and support services and some professional workers.

[203] Dawson recalled Costello's saying that the leave policy could not be bargained over; it was something employees had to deal with because it was a policy of the Union. (Tr. 296.)

[204] As previously noted, Dawson said that she was in and out of the three meetings she attended.

Lora Hyde was called to testify regarding Costello's alleged statements about strike discharge allegations by the General Counsel.

Hyde said that she attended an employer-sponsored meeting sometime in March 2001 at which Costello conducted a presentation covering issues pertinent to the union campaign at the North Campus Lab. Newman and lab employees John Glenndenning, Georgette Fenton, and Emily O'Neal were also present.[205]

Hyde related that Costello used a video screen for her presentation which included a listing of all of the current benefits employees received at the hospital. According to Hyde, Costello said that if the Union were voted in, employees would have to bargain from scratch and, that if the Union came in, we could lose these benefits.

Hyde added that Costello's presentation showed pictures of striking workers. According to Hyde, Costello said that it was a strong possibility that the Union could call a strike and if a strike were called, employees could be fired and new employees would be hired because the hospital has to maintain a sufficient work force to provide patient care.

Newman acknowledged giving a number of video presentations at the North Campus Lab with Costello. Newman stated that regarding the issue of benefits, she only spoke from the script of her presentation materials and, in fact, did not recall any specific questions about leave or vacation. Newman specifically denied saying anything about time-off policy being negotiable or that laboratory flex time would be automatically taken away if the Union were successful. Newman said that she understood these could be bargaining points. Newman also denied saying that

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[205] Hyde advised that O'Neal and Fenton stayed at this meeting for only a few minutes. Glenndenning also did not stay for the entire meeting. These employees did not testify at the hearing.

employees would have to give 6 weeks' advance notice for the taking of leave if the Union were voted in.

Regarding the topic of strikes, Newman recalled a strike related question during a presentation but she said nothing beyond the script. Newman acknowledged having entertained a question from an employee as to whether the hospital would protect employees who crossed the picket line at a presentation. Newman responded that she did not know and told the employee she would have to get the answer to the question later.

Newman, confronted with Hyde's record testimony, denied saying that employees would be fired if they went on strike. Newman said she read from the slide presentations script on the topic of strikes.[206]

Newman also denied saying anything about the Union's tearing the department apart, and that neither she nor Costello told any employee that leave policies would change or that they could not take time off without being reprimanded. Newman stated this would be a threatening statement of the type she was instructed by the consultants not to make. Newman also denied attributing a nonflexible time-off policy to the Union.

Newman acknowledged knowing Dawson but could recall no questions from her in the presentation meetings. Newman said that she was never approached by her with a question or concern about the Union.

Costello essentially echoed and corroborated Newman's testimony regarding her role in the presentations and denied going "off script" in the meetings where either the video or

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[206] Shown R. Exh. 2, the power point presentation by the Respondent's counsel, Newman read from the slide, quoting "that they retain their status of employees and cannot be discharged but they could be replaced by the employer. See also R. Exh. 2.

power point materials were shown.[207] Costello said she gave the video presentation about a dozen times, usually with Newman as her co-presenter. According to Costello, the video presentation utilized a video played on a video cassette recorder and a binder, including a copy of the St. Vincent's/UAW contract that employees were at liberty to peruse. Costello said the procedure she (and Newman) employed was to assemble employees in resource rooms at the North Campus Lab, the central processing work area and at the main hospital in the phlebotomy breakroom, play the video and have a question and answer session. The video presentations were all made at the North Campus Lab before groups of employees numbering between 2 and 20 for each session.

Costello denied making any threats during her video presentations to the employees that they would be fired or discharged if they participated in a strike. Shown the transcript testimony of Hyde, Costello specifically denied making the statements attributed to her regarding striking workers being fired.

Costello also denied that either she or Newman said that employees would have to give 6 weeks' notice to take time off if the Union were voted in. However, Costello admitted that Newman did say at one of the video presentations that the St. Vincent's Hospital contract appeared to require employees to give 6 weeks' notice for vacation leave. Costello could not recall at which particular presentation Newman made the observation but it was one of only

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[207] Costello admitted that she did depart from the script on an occasion when she commented about a picture of an individual shaking hands with the designer of the UAW's golf course in the power point materials, asking flippantly whether anyone would ever be invited to play at the course.

possibly two times they possibly varied from the script.[208] Costello also denied that neither Newman nor she told employees that there would be more restrictive time-off or leave policies if the Union were voted in or that employees in such an event would not be eligible for "flex time" off. Costello also denied saying that if the Union were selected, the Union could unilaterally set time off policy; Costello said that she understood this was a subject of collective bargaining.

Regarding the strikers, Costello again reaffirmed her staying with the script, specifically that of the power point presentation's section, "Basic Guide to the NLRA," which dealt with the topic. Costello denied varying from the text on the issue of strikers, and that she never said if there was an economic strike and employees participated, they would lose their jobs.[209] Costello could only recall one question from an employee regarding security of employees who cross the picket line, and Newman told the employee she thought security would be provided, but she would check on the matter with management.

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[208] Costello said that either she or-Newman also told the employees that a 6-week requirement would not necessarily be required of the Respondent's employees. Notably, Newman said that neither she nor Costello ever said anything about having to give 6 weeks' notice for leave if the Union came in. See R. Exh. 45, entitled "A Look at the St. Vincent's-UAW Labor Agreement," which Newman said was a handout made available with the actual draft of the St. Vincent's contract with the Union. The handout, quoting draft language of the St. Vincent's contract requiring *8 weeks' written notice* for days-off requests, asks "Do you always know 8 weeks in advance if you'll need a day off?"

[209] The "Basic Guide to the NLRA" is published by the Board and was excerpted in the video presentation (R. Exh. 2) given by Costello and Newman. The video asks the question, "If there is a strike will you still have a job," and then, quoting from the basic guide, gives a detailed answer of striking workers' rights.

Employees Sharon Serres, Marja Solkkeli-Dooner, Dennis Dean Burkholder, and Nancy Seigneur were called by the Respondent to corroborate Newman and Costello.

Serres[210] testified that she was a presenter during the union organizing campaign and worked with the overhead slide, power point, and video presentations. Serres stated that when she worked with a coworker, one or the other would operate the demonstration machinery, e.g., the overhead projector, or power point computer, and the other would read from the text of scripted materials. According to Serres, she and other presenters were instructed by the consultants to answer all questions by reference to a slide, and any questions not covered by the material or concerning something she did not know were to be answered at a later time after consultation with the consultants.

Serres noted that she presented the power point materials about four times, once with Costello and with a group of around 70-75 employees on March 17, 2001. Serres noted that in her presentation with Costello, she read from the slides and someone asked Costello whether the hospital would provide security to employees who crossed the picket line.

According to Serres, Costello told the employee that she thought the hospital had a right to get the caregivers to the patients but that she would get back to her with a definitive answer. Serres said that neither she nor Costello said anything about striking employees getting fired.[211]

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[210] Serres is employed as an operations director at the Toledo Hospital's vascular rehabilitation and research program, a position she has held for about 3 years.

[211] Serres said nothing was said about strikes other than the reference to strikers in R. Exh. 2.

Serres could recall no questions from employees regarding what would happen to leave and vacation time off if the Union were voted in. However, neither she nor Costello said that if the Union were successful, there would be more restrictive leave or time-off policies. Serres also denied that either said that if the Union were voted in, it would unilaterally set leave and vacation policy or that such issues would not be negotiable. Serres conceded that employees may have asked about benefits-she could not be sure-but she, nonetheless, insisted that her stock reply was invariably, everything is negotiable with a third party (union), that any benefits the employees currently had, e.g., flexible time off, would not automatically go away if the Union were voted in.[212]

Dooner,[213] after having been given training by the Respondent's consultants, co-presented the power point materials with Newman. According to Dooner, Newman usually read the materials, except for long passages that were summarized by Newman. Dooner recalled a March 17, 2001 (St. Patrick's Day) presentation at which she operated the computer and Newman read the scripted materials before about 10-15 employees. Dooner stated that no 401(k) questions were asked that she could remember, but she was absolutely certain Newman did not tell employees that the 401(k) could not be implemented in July (2001) if the Union were voted in. Dooner said that Newman did not tell employees that there would be a more restrictive leave policy if the Union were selected or that employees would have to give a maximum of 6 weeks' notice to take time off. In fact,

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[212] Serres said that actually she could not recall the issue coming up in her department or making any statement in the presentation regarding leave or time-off policies.

[213] Dooner has served as the Respondent's director of emergency and trauma services for the past 2 years; she supervises about 120 full-time employees.

Dooner could not recall these matters or the possible loss of the employees' current flexible time-off policy even being discussed.

Burkholder[214] testified that, like other supervisors and managers selected to be a presenter during the union campaign, he was given training on the presentation materials by representatives of the human resources and the consultants hired by the hospital. According to Burkholder, the consultants guided him through the materials slide by slide, familiarized him with the accompanying scripts, and showed a mock presentation. Burkholder stated that he was instructed that although presenters might be uncomfortable delivering a scripted presentation, all employees were to receive the same information from management.

Burkholder stated he was involved in issues and answers presentation that utilized overhead slides and a script with his supervisor, Newman, with whom he co-presented on March 5 and 7, 2001, at the Toledo Hospital and the North Campus Lab, respectively.

At the March 5 session, Burkholder said he was the script reader and Newman operated the projector. According to Burkholder, there were questions from employees about benefits, whether these would change or be diminished as a consequence of the election. Burkholder said he responded verbatim according to the issues and answers materials.[215]

According to Burkholder, he never heard Newman say that the hospital's leave and vacation policy would

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[214] Burkholder has been engaged at Toledo Hospital as a microbiological technologist coordinator since 1996. He had been employed in another capacity with Flower Hospital since 1983. In his current position, Burkholder supervises 24 employees.

[215] Burkholder, by way of example, said he read the portion of R. Exh. 5 on pp. 24-25, which says, "In bargaining ... them are no guarantees you may gain, lose or retain the same pay or benefits."

automatically change if the Union were successful or that the Union could unilaterally set the leave and vacation policy.[216] Burkholder denied that either he or Newman told the employees they would have to give a minimum of 6 weeks' notice to take time off.[217] According to Burkholder, because Newman was the manager in charge, she was the primary responder to questions posed by the employees. He could not recall with specificity whether he answered any questions but if he did, his responses tracked the script or the language contained on the overheads.

Burkholder conceded that because everyone could read the overhead transparencies for him or herself, he and Newman did not simply always reread the text in answering questions but paraphrased an answer utilizing the script language. However, in the presentations, Burkholder insisted that Newman did not depart from the script or the transparencies.

Seigneur[218] attended two employer-sponsored presentations, the overhead and power point, conducted by Newman-Burkholder and Newman-Costello, respectively, prior to the election.

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[216] Burkholder also denied that Newman ever said the 401(k) plan would be lost if the Union were voted in, or that the 401(k) would go into effect dependent on the outcome of the election. He said there was no connection between the two events. Burkholder said he never heard Costello say that current leave and vacation policies would automatically change or be lost.

[217] Burkholder emphasized that he utilized the script to answer questions and that the approach he and Newman used in the case of questions they could not answer was to consult with management and then get back to the employees. He pointed out the issues and answers script set out that procedure in the text.

[218] Seigneur is currently employed at Toledo as a laboratory medical technologist for the past 18 years; she was ineligible to vote in the election.

Regarding the Newman-Burkholder presentation, Seigneur said neither presenter said to the approximately 30 employees that if the Union were voted in, the laboratory would not continue its current flexible time-off policy; that the hospital would adopt a more restrictive time-off policy or that time-off policy would be unilaterally decided by the Union.[219]

Seigneur noted that Costello and Newman presented the power point presentation in the laboratory breakroom during the morning with approximately 30 employees in attendance; she could not recall the exact day or month of the presentation. Seigneur could recall no questions regarding the time-off policy but that neither of the presenters said the flexible time-off policy would change if the Union were voted in and neither said if the Union were successful, there would automatically be more restrictive time-off policies. Seigneur also stated that Newman and Costello did not say that if the Union were voted in, there would be a minimum of 6 weeks' advance notice required to take time off or that the Union would be able unilaterally to establish time-off and vacation policy.[220]

According to Seigneur, she did not hear Costello (or Newman) say that if employees went out on strike they would be fired; she heard no one from management say this.

Discussion and Conclusions of the Restrictive Leave Policies and Striker Discharge Allegations

Once more, the resolution of the allegations boils down to credibility. To a veritable certainty, under established Board

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[219] Seigneur also denied that Newman or Burkholder said anything about the loss of cross-training in the lab.

[220] Seigneur also said that she heard no management representative say the 401(k) plan would not be implemented in July if the Union were successful.

law, if the Respondent's supervisors made the statements attributed to them at the employee meetings, then finding of a violation of the Act would be warranted.

At the outset, it should be noted that the Respondent's presentation materials are not alleged or argued to be unlawful by content or presentation methodology. Additionally, it is not disputed that the Respondent retained labor consultants to guide and instruct its managers in presenting its side or response to the Union's organizing efforts. The Respondent's witnesses to a man and woman all testified similarly to their own conduct and that of the person they were teamed with in making the presentations, claiming basically they gave scripted presentations with little or no variance from the text of the materials. Newman and Costello, the targets of the instant charges, insisted and persisted in their position of following and staying on script in the many presentations they gave.

The General Counsel produced two witnesses (out of possibly hundreds) who claimed to have heard Newman and/or Costello making statements which were clearly off script and, all things considered, highly threatening (if not inflammatory) of employees' rights guaranteed under the Act. This does not seem plausible to me.

I would agree with the Respondent that, with respect to these charges, the General Counsel has not met his burden.

I must make clear that Hyde and Dawson were not incredible. However, the Respondent's witnesses were not only credible testimonially, but also produced corroborative evidence of the presentations they participated in or witnessed firsthand. Newman and Costello, in particular, seemed honest and forthright, and savvy employees. It does not seem plausible that given their backgrounds, experience, and responsibilities, they would make the statements in question. At best, the evidence as to these charges is in equipoise; and, in agreement with the Respondent, I would

recommend dismissal of the charges and an overruling of the election objections associated therewith.

Conclusions of Law

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its (their) employees with unspecified reprisals because of their union activities, sympathies, or support, the Respondents violated Section 8(a)(1) of the Act.

4. By enforcing its (their) solicitation, distribution, and loitering policy selectively and disparately; that is, by restricting union related solicitations and distributions while not in likewise restricting nonunion related solicitations and distributions, the Respondents violated the Act.

5. By creating an impression among its (their) employees that their union activities were under surveillance, the Respondents violated Section 8(a)(1) of the Act.

6. By coercively informing its (their) employees that they should terminate their employment with the Respondents if they supported the Union, the Respondents violated Section 8(a)(1) of the Act.

7. By informing employees that wage increases previously promised them were being placed on hold because the Union filed a petition seeking to represent them, the Respondents violated Section 8(a)(1) of the Act.

8. By discriminatorily issuing disciplinary coachings to the following employees on or about the dates below because of their support of and activities on behalf of the Union, the Respondents violated Section 8(a)(3) and (1) of the Act:

Billie Smith	May 16 and July 13, 2000
Robert Hasenfratz	May 17 and August 24, 2000
Dea Lynn Keckler	June 14, 2000

Cynthia A. Miller	July 25, 2000
Christine Gallagher	June 26, 2000

9. By the aforesaid conduct, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

10. The Respondents have not violated the Act in any other way, manner, or respect.

The Remedy

Having found that the Respondents have engaged in unfair labor practices warranting a remedial order, I shall recommend that they cease and desist from engaging in such conduct and that they take certain affirmative action designed to effectuate the policies of the Act and post an appropriate notice to their employees.

It is recommended that the Respondents rescind the disciplinary coachings to employees Billie Smith, Robert Hasenfratz, Dea Lynn Keckler, Cynthia Miller, and Christine Gallagher; remove any reference to the disciplines of these aforestated employees from all of the Respondents' records; and make them whole for any loss of earnings and benefits they may have suffered as a result of the Respondent's discrimination against them, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); less interim earnings, plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[221]

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[221] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondents, Promedica Health Systems, Inc., and The Toledo Hospital and Toledo Children's Hospital, a Subsidiary of Promedica Health Systems, Inc., Toledo, Ohio, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals because of their union activities, sympathies, or support.

(b) Enforcing their solicitation, distribution, and loitering policy selectively and disparately; that is, by restricting union-related solicitations and distributions while not in likewise restricting nonunion related solicitations and distributions.

(c) Creating the impression among their employees that their union activities were under surveillance.

(d) Coercively informing their employees that they should terminate their employment with the Respondents if they supported the Union.

(e) Informing employees that wage increases previously promised them were being placed on hold because the Union filed a petition seeking to represent them.

(f) Counseling/coaching or otherwise discriminating against any employee for supporting or engaging in any activities on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files the unlawful counselings/coachings issued to Billie Smith, Robert Hasenfratz, Dea Lynn Keckler,

Cynthia Miller, and Christine Gallagher and within 3 days thereafter, notify each of them in writing that this has been done, and that the warnings will not be used against them in any way.

(b) Within 14 days from the date of the Board's Order, make Billie Smith, Robert Hasenfratz, Dea Lynn Keckler, Cynthia Miller, and Christine Gallagher whole for any loss of earnings and benefits suffered by them as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its facilities in Toledo, Ohio, copies of the attached notice marked "Appendix."[222] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2000.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible

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[222] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

It is also ordered that the elections in Cases 8-RC-16175 and 8-RC-16176 are set aside and remanded to the Regional Director to conduct a second election when he deems the circumstances permit a free choice. The second election shall be conducted in a manner consistent with the "Direction of Second Election," as set out in the aforementioned appendix, notice to employees.

It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

DIRECTION OF SECOND ELECTION

It is further directed that Cases 8-RC-16175 and 8-RC-16176 are remanded to the Regional Director for Region 8 for the purpose of conducting a new election at such time as he deems appropriate. A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began

more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. May 6, 2003

APPENDIX

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not threaten you with unspecified reprisals because of your union activities, sympathies, or support.

We will not enforce our solicitation, distribution, and loitering policy selectively and disparately; that is, by restricting union-related solicitations and distributions while not in likewise restricting nonunion related solicitations and distributions.

We will not create the impression among you that your union activities are under surveillance.

We will not coercively inform you that you should terminate your employment with us if you support the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other union.

We will not inform you that wage increases previously promised you are being placed on hold because the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other union, filed a petition seeking to represent you.

We will not discriminatorily issue disciplinary counselings or coachings to you because of your support of and activities on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other union.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed you by Section 7 of the Act.

We will within 14 days from the date of this Order, make Billie Smith, Robert Hasenfratz, Dea Lynn Keckler, Cynthia Miller, and Christine Gallagher whole for any loss of earnings and benefits suffered by them as a result of the discrimination against them.

We will within 14 days from the date of this Order, remove from our files any references to the disciplines of employees Billie Smith, Robert Hasenfratz, Dea Lynn Keckler, Cynthia Miller, and Christine Gallagher and, within 3 days thereafter, notify them in writing that this has been done and that the disciplines will not be used against them in any way.

Promedica Health Systems, Inc., and The Toledo Hospital and Toledo Children's Hospital, a Subsidiary of Promedica Health Systems, Inc.

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SUPREME COURT, U.S.

No. 06-956

In the Supreme Court of the United States

PROMEDICA HEALTH SYSTEMS, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner discriminatorily enforced its rule against solicitation in patient care areas by disciplining three employees for engaging in union solicitation while permitting widespread commercial and other non-union-related solicitation.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-20a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 21a-207a) are reported at 343 N.L.R.B. 1351.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2006. The petition for a writ of certiorari was filed on January 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, including the right "to form, join, or assist labor organizations," 29 U.S.C. 157. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

Although solicitation of fellow employees on behalf of a union is protected activity under the Act, the National Labor Relations Board (NLRB or Board) has long recognized that legitimate employer interests justify some restrictions on solicitation. In particular, because "the primary function of a hospital is patient care and * * * a tranquil atmosphere is essential to the carrying out of that function" (*St. John's Hosp. & Sch. of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), modified, 557 F.2d 1368 (10th Cir. 1977)), the Board, with this Court's approval, has held that a hospital may prohibit solicitation in patient care areas at all times. *NLRB* v. *Baptist Hosp.*, 442 U.S. 773, 778, 787-790 (1979); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 495, 506-507 (1978). A hospital must, however, apply any restriction on solicitation in an evenhanded manner. The hospital may not enforce even a valid restriction against union solicitation while forgoing enforcement against other types of solicitation prohibited by the rule that are disruptive of patient care or disturbing to patients. *St. Vincent's Hosp.*, 265 N.L.R.B. 38, 39-40 (1982), enforced in pertinent part,

729 F.2d 730, 735 (11th Cir. 1984); see, *e.g.*, *NLRB* v. *St. Francis Healthcare Ctr.*, 212 F.3d 945, 960 (6th Cir. 2000). Discipline of an employee for violating a no-solicitation rule by engaging in union activity violates Section 8(a)(3) and (1) of the Act when the discipline amounts to discrimination in enforcement of the rule. *NLRB* v. *Pneu Elec., Inc.*, 309 F.3d 843, 857 (5th Cir. 2002).

2. a. Petitioner ProMedica Health Systems, Inc., operates several hospitals and related facilities in northwestern Ohio and southwestern Michigan, including petitioner Toledo Hospital and the Flower Hospital. Beginning in early 2000, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) sought to organize employees at the Toledo and Flower Hospitals. Pet. App. 23a.

At all material times, petitioners maintained a facially neutral policy on solicitation that provides, in pertinent part:

> Solicitation by employees for funds, membership or individual enlistment in outside organization[s] or causes is prohibited at all times on work time and in immediate patient care areas. Solicitation is also prohibited if either the soliciting employee or the employee being solicited is on working time. Solicitation by employees shall be permitted during non-working time in all non-working areas of the facility that are not immediate patient care areas.

Pet. App. 48a-49a. The policy defined "immediate patient care areas" as "areas where patient care occurs including patient rooms, patient treatment areas, patient sitting rooms and elevators, stairways and corri-

dors used to transport patients." *Id.* at 50a. Patient care areas also included nurses' stations. *Id.* at 80a.

Notwithstanding that rule, employees at both hospitals regularly sold and solicited sales for numerous products, including Tupperware, cosmetics, candles, and Boy Scout and Girl Scout products. Sales and solicitations occurred openly at the nurses' stations and in other work areas, and booklets and catalogues for some of the products were left for prolonged periods at the nurses' stations, where they were plainly visible. Although supervisors were inevitably aware of those sales and solicitations, supervisors did not enforce the no-solicitation rule or discipline solicitors until the commencement of union activity. Pet. App. 8a-9a, 69a, 80a, 86a, 97a, 133a, 140a-141a.

b. On May 12, 2000, a newspaper article quoted Robert Hasenfratz, a registered nurse at Flower Hospital, as expressing support for a union. On May 17 or 18, Hasenfratz's supervisor called him to a meeting at the end of his shift. The supervisor told Hasenfratz that someone had complained about his soliciting "something" about the Union, but the supervisor refused to identify the complainant. Pet. App. 85a. Hasenfratz said that he had solicited only in the cafeteria and employee breakroom. The supervisor gave him a copy of the solicitation policy and told him to conduct his union activity in the cafeteria. The supervisor also issued him a disciplinary warning called a "coaching." *Id.* at 85a-86a.

On approximately June 4, 2000, Supervisor Susan Sommer called Dea Lynn Keckler, a registered nurse and former supervisor at the Toledo Hospital, to her office for a meeting. Sommer told Keckler that she had received a complaint that Keckler had distributed union

literature at the nurses' station. She told Keckler that union activities were allowed only in the cafeteria and the garage. She subsequently prepared a communication log stating that she had given Keckler a coaching. Pet. App. 68a-69a, 73a.

On July 25, 2000, Supervisor Sommer phoned Cynthia Miller, another Toledo Hospital registered nurse, at home. Sommer told Miller that a supervisor in another unit in the hospital had reported observing Miller distributing union materials in the supervisor's unit. Miller replied that she had only been trying to deliver candles that she had sold to another employee. Sommer also told Miller that an employee had complained about Miller's calling her at home to talk about the Union. She conceded that what Miller did on her own time was her business, but said that the hospital did not want union supporters distributing union materials in the nurses' stations. Sommer subsequently wrote a communication log entry indicating that the foregoing conversation constituted a coaching of Miller. Pet. App. 131a-132a, 134a.

3. The Board's General Counsel issued a complaint alleging, in relevant part, that petitioners violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by disparately enforcing the no-solicitation/no-distribution rules against union solicitation and distributions while not similarly restricting non-union solicitations, and by disciplining Keckler, Hasenfratz, and Miller for their union activities. Pet. App. 67a, 78a, 84a, 95a, 131a, 139a.

The administrative law judge (ALJ) found, in relevant part, that petitioners violated the Act as alleged. The ALJ found that nurses' stations were patient care areas. Pet. App. 80a. He further found that, although petitioners' rule prohibiting solicitation in patient care

areas was facially valid, petitioners permitted widespread, open solicitation for numerous products, including Tupperware, cosmetics, Boy Scout and Girl Scout products, and candles, at nurses' stations and other work areas. *Id.* at 50a, 80a-81a, 97a, 140a-141a. Accordingly, the ALJ concluded, petitioners' enforcement of its solicitation policy against union supporters who distributed in patient care areas, including the nurses' stations, was discriminatory and unlawful. *Id.* at 80a-81a, 141a, 200a.

In finding that petitioners unlawfully disciplined Keckler, Hasenfratz, and Miller, the ALJ first held that the coachings—which could support future formal discipline against the coached employees—were part of petitioners' disciplinary scheme and therefore triggered the protections of Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3).[1] Pet. App. 81a. He further found that petitioners' discipline of the three employees was unlawful because it "was based on [petitioners'] discriminatory enforcement of [their] solicitation policy." *Id.* at 82a; see *id.* at 97a, 141a, 200a-201a.

The Board adopted the ALJ's findings. Pet. App. 22a. The Board ordered petitioners to cease and desist from enforcing their solicitation and distribution policy selectively and disparately, and from discriminatorily issuing disciplinary coachings to employees because of their union activity, and further ordered petitioners to remove references to the unlawful discipline from the employees' files. *Id.* at 31a-32a.[2]

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[1] Petitioners do not challenge that finding, which the Board adopted, Pet. App. 23a-24a, and the court of appeals affirmed, *id.* at 7a.

[2] Petitioners do not challenge other violations found by the Board and upheld by the court of appeals, including that petitioners threatened an employee with reprisals for union activity, told an employee

4. The court of appeals, in an unpublished decision, affirmed the Board's findings that the foregoing disciplinary actions were unlawful and enforced the associated portions of the Board's order. Pet. App. 3a-20a. The court held that substantial evidence supported the Board's finding that petitioners' enforcement of the no-solicitation/no-distribution rule was lax with respect to non-union-related solicitation and distribution. The court stated that the record was "replete" with evidence showing "widespread and open non-union-related solicitation for and distribution of various commercial and charitable products—Tupperware, Avon cosmetics, and Girl Scout Cookies, for example." *Id.* at 8a. The court noted that "books and catalogues offering those products were commonly left lying around work areas, including 'patient care areas' (such as the nurses' station)." *Ibid.* The court therefore concluded that "substantial evidence supports the finding that [petitioners were] aware of the significant volume of non-union-related solicitation/distribution and selectively and disparately enforced the Policy in violation of the Act." *Id.* at 9a.

The court of appeals also affirmed the Board's finding that petitioners violated the Act by discriminatorily issuing coachings to employees Keckler, Miller, and Hasenfratz. The court noted that each employee testified that he or she received coachings "for engaging in pro-Union activities that violated the Policy while [peti-

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that she should cease working for petitioners if she supported the Union, created the impression that an employee's union activities were under surveillance, and issued disciplinary coachings to two other employees because of their union solicitations. Pet. App. 10a-11a, 13a-17a, 22a-32a, 200a-201a.

tioners] generally ignored non-Union-related violations." Pet. App. 10a.

The court of appeals rejected petitioners' argument "that, even if [they] knowingly permitted 'isolated' non-union related solicitations and distributions," petitioners did not violate the Act by enforcing the policy against the three employees who solicited for the Union in patient care areas. Pet. App. 11a. The court noted petitioners' reliance on *Southern Maryland Hospital Center* v. *NLRB*, 801 F.2d 666, 674 (4th Cir. 1986)—in which the Fourth Circuit stated that evidence that a hospital had allowed "some innocuous activity to go unpunished in the past" did not establish "that *any* subsequent attempt by the hospital to control union solicitation in its patient care areas" would be an unfair labor practice. The court stated, however, that its precedent conflicted with that rule, citing its decision in *Mt. Clemens General Hospital* v. *NLRB*, 328 F.3d 837, 848 (6th Cir. 2003), which held that a hospital unlawfully prohibited nurses from wearing, in patient-care areas, a pin related to a bargaining dispute, because the hospital otherwise permitted nurses to wear personal, union, and hospital buttons in patient care areas. Pet. App. 11a.

ARGUMENT

1. The unpublished decision of the court of appeals does not present the legal question that petitioners seek to raise. Petitioners assert that the court of appeals held that a hospital that "has previously permitted or overlooked isolated instances" of solicitations in patient care areas for "Girl Scout cookies, church raffle tickets, or the like" must thereafter also allow union solicitation in those areas. Pet. 1-2; see Pet. 6 (asserting that the court held that "a hospital may not undertake efforts to

control union-related solicitation or distributions in patient care areas if it has ever condoned or overlooked an employee's sale of Girl Scout cookies or charity raffle tickets at a nurses' station"). The court of appeals held no such thing. Instead, the court held that substantial evidence supported the Board's factual findings that non-union-related solicitations in patient care areas, including the nurses' stations, were not isolated but "widespread and open," and that they included purely commercial solicitations for the purchase of products like Tupperware, cosmetics, and candles. Pet. App. 8a. The court of appeals also affirmed the Board's findings that petitioners were aware of those "common-place" commercial solicitations but regularly failed to stop them or to discipline the solicitors. *Id.* at 9a.[3]

To the extent that petitioners take issue (Pet. 4-5) with the concurrent conclusions of the Board and the court of appeals that petitioners knowingly failed to

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[3] Contrary to petitioners' contention (Pet. 1-2, 3), the Board also has not held that an isolated failure to enforce a no-solicitation rule precludes a hospital from enforcing the rule against union solicitation. The Board "has evaluated the 'quantum of . . . incidents' involved to determine whether unlawful discrimination has occurred" and has "consistently * * * held that an employer does not violate Sec. 8(a)(1) by permitting a small number of isolated 'beneficent acts' as narrow exceptions to a no-solicitation rule." *Hammary Mfg. Corp.*, 265 N.L.R.B. 57, 57 n.4 (1982) (citations omitted). *See Zurn/N.E.P.C.O.*, 345 N.L.R.B. No. 1, 2005 WL 2041037, at *4 (Aug. 22, 2005) (citing *Hammary* and finding that employer lawfully disciplined employee for engaging in union solicitation at work, even though it allowed solicitation for United Way campaign), petition for review pending on other issues, No. 05-2590 (6th Cir.) (filed Dec. 5, 2005). Because neither the Board nor the court of appeals has adopted the legal rule that petitioners attribute to them, petitioners err in contending (Pet. 10-12) that this Court's review is necessary to prevent "dire consequences for employers, employees, and patients." Pet. 10.

enforce their no-solicitation policy against widespread commercial and other non-union-related solicitation, petitioners raise only a factual issue that does not warrant this Court's review. See *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981).

2. Based on the record evidence that petitioners repeatedly failed to enforce the no-solicitation rule in the face of "widespread" and "common-place" commercial and other non-union-related solicitations, the court of appeals correctly upheld the Board's finding that petitioners engaged in unlawful discriminatory enforcement of the rule against union solicitation. See Pet. App. 6a-11a.

Petitioners erroneously contend that the court of appeals' holding is based on "a highly strained construction of the term 'discrimination.'" Pet. 10. On the contrary, the court's decision is entirely consistent with the generally accepted definition of discrimination—"that the employer treated similar conduct differently." *Restaurant Corp. of Am.* v. *NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987). Here, the no-solicitation rule itself indicates that commercial and other non-union-related solicitation is just as disruptive as the union solicitation that petitioners punished, because the rule treats them equally and prohibits them both. Indeed, petitioners have consistently contended that their managers enforced the no-solicitation rule with respect to sales, fund-raising activities, and charitable solicitations. See Pet. 4. Although the ALJ and the Board did not credit that contention (Pet. App. 97a), it constitutes an acknowledgment that the no-solicitation rule prohibits those activities just as much as union solicitation.

Equal treatment of union solicitation and commercial and other non-union-related solicitation is consistent with the underlying purpose of a no-solicitation rule like the one at issue here. The purpose of a ban on solicitation in patient care areas of a hospital is "to avoid disruption of patient care and disturbance of patients." *NLRB* v. *Baptist Hosp.*, 442 U.S. 773, 778 (1979). This Court has recognized that any solicitation that interferes with the health care activities of doctors, nurses, and staff may disrupt patient care. *Id.* at 781 n.11. "Widespread" and "common-place" commercial solicitation like the solicitation at issue here can interfere with the health care duties of nurses and other staff just as can union solicitation. See *Lucile Salter Packard Children's Hosp. at Stanford* v. *NLRB*, 97 F.3d 583, 592 (D.C. Cir. 1996) (finding that hospital had not shown that union's attempted solicitation—distributing materials from a table near the hospital's cafeteria—was any more disruptive than similar non-union-related distributions in that location allowed by the hospital); *Presbyterian/St. Luke's Med. Ctr.*, 258 N.L.R.B. 93, 99 (1981) (purchase, sale, and distribution of commercial products necessarily distract from patient care), enforced, 723 F.2d 1468, 1478 (10th Cir. 1983). Accordingly, the Board may reasonably find unlawful discrimination when an employer enforces a no-solicitation rule against employees' union solicitation, but not against other prohibited employee solicitation that is "widespread" and "common-place" and thus likely to disrupt patient care or disturb patients.[4]

[4] Contrary to petitioners' suggestion (Pet. 8 n.1), *Sandusky Mall* v. *NLRB*, 242 F.3d 682, 686 (6th Cir. 2001), is not to the contrary. Although that case adopted a narrow definition of "discrimination," it did so only in the context of solicitation by nonemployee union organiz-

3. Petitioners erroneously contend (Pet. 4, 7-9) that this Court's review is necessary because the court of appeals' decision conflicts with *Manchester Health Center, Inc.* v. *NLRB*, 861 F.2d 50 (2d Cir. 1988), and *Southern Maryland Hospital Center* v. *NLRB*, 801 F.2d 666 (4th Cir. 1986). There is no conflict.

In *Manchester Health Center*, the Second Circuit held that "where a health-care facility has been involved in a bitter and divisive strike, it may, as a part of a strike settlement, agree with the union to limit discussion of union affairs to nonpatient areas during nonwork time." 861 F.2d at 51. The court expressly disclaimed any intention "to suggest that an employer may unilaterally impose such a rule." *Id.* at 55. The court also noted that the employer already had a rule prohibiting discussion of controversial matters in the presence of patients, so that union-related discussions were not

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ers. The court in *Sandusky* relied on its prior opinion in *Cleveland Real Estate Partners* v. *NLRB*, 95 F.3d 457, 464-465 (6th Cir. 1996). The Sixth Circuit, however, has expressly declined to apply *Cleveland Real Estate* when, as in this case, the prohibited union solicitation is by employees. See *Meijer, Inc.* v. *NLRB*, 130 F.3d 1209, 1212-1213 (1997). In any event, any tension between the decision in this case and other Sixth Circuit decisions should be resolved by that court, not this one. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

The Seventh Circuit's decision in *6 West Ltd. Corp.* v. *NLRB*, 237 F.3d 767 (2001), on which petitioner also relies (Pet. 8 n.1), is also inapposite. There, the Seventh Circuit determined that, in the context of a restaurant, "innocent" activities, such as the sale of Girl Scout cookies or handmade Christmas ornaments during the holiday season, were not as disruptive to the restaurant's operations as union solicitations would have been. 237 F.3d at 780. That decision obviously does not address the question whether, on the facts of this case, "widespread" and "common-place" commercial solicitations in a hospital's patient care areas were as disruptive of patient care as union solicitation.

singled out for prohibition. *Id.* at 54. In this case, as shown above, petitioners singled out union solicitation for punishment, and did so unilaterally, without any consultation with the Union. There is no conflict with *Manchester Health Center.*

There is also no conflict with *Southern Maryland Hospital Center.* In that case, the Fourth Circuit upheld the hospital's discipline of an employee for violating a no-solicitation rule despite "evidence that *some* raffle tickets, Girl Scout cookies and cosmetics were sold by employees without reproach." 801 F.2d at 674 (emphasis added). On that record, the court characterized the Board's order finding an unfair labor practice as resting on the position that any prior failure to enforce a no-solicitation rule against "some innocuous activity" precludes a hospital from "*any* subsequent attempt" to control union solicitation in patient care areas. *Ibid.* The court rejected that position. *Ibid.* The court did not hold, however, that an employer could validly impose discipline for union solicitation on a record like the one here, involving a pattern of open, widespread, and unpunished disregard of a no-solicitation rule in patient care areas, broken only by rigid enforcement of the rule against union activists.

It is by no means clear that the Fourth Circuit would reject a finding of unlawful discrimination on a record comparable to the one in this case. In a later case also involving Southern Maryland Hospital Center, the court, although it again found no discrimination, stressed the lack of "evidence that the hospital ever allowed salesmen to solicit sales of products to employees in the cafeteria" where it prohibited a nonemployee union organizer from soliciting. *NLRB* v. *Southern Md. Hosp. Ctr.*, 916 F.2d 932, 937 (4th Cir. 1990). The court stated that the

Board's finding of discrimination might have been upheld if it had "presented examples of this type of discriminatory enforcement." *Ibid.* Thus, the Fourth Circuit has not yet taken a position on the precise question presented by this case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Because there is no conflict among the courts of appeals, petitioners are mistaken in contending (Pet. 9-10) that review is warranted because "varying standards applicable to the enforcement of solicitation and distribution policies leave[] employers and employees—not to mention hospital patients—on unstable ground." Pet. 10.